Racist Speech Outsider Jurisprudence and the Meaning of America

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Almost thirty years ago, Harry Kalven, Jr., one of the leading legal scholars of the twentieth century, wrote a book in which he attempted to analyze the impact of changing race relations and the civil rights movement on first amendment law. In the book he observed that African Americans did not often resort to the courts to combat racist speech. He was “tempted to say that it will be a sign that the Negro problem has basically been solved when the Negro begins to worry about group-libel protection.”

Times have changed (although few would claim that the plight of African Americans has basically been solved). African Americans are deeply concerned with the problem of racist speech in American society, and they are not alone. Many have urged that punitive sanctions be imposed against the perpetrators of such speech. Perhaps the

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1 Harry Kalven, Jr., The Negro and the First Amendment (1965).
2 Id. at 10-11.
3 Id. at 11.

Liberal critics of the Reagan era sometimes note that social policy in the United States, to the extent that it concerns black children and poor children, has been turned back several decades. But this assertion, which is accurate as a description of some setbacks in the areas of housing, health, and welfare, is not adequate to speak about the present-day reality in public education. In public schooling, social policy has been turned back almost one hundred years.


5 So far as I am aware, however, no one proposes the prohibition of all speech that might be labelled “racist.” Unless the context makes it otherwise clear, I use the term “racist speech” in this article to refer to a universe of speech that is narrower than many would deem to be racist in ordinary circumstances. The forms of speech I include within the term “racist speech” include fighting words and other forms of speech that have trig-
most persuasive writings have come from practitioners of outsider jurisprudence, a thriving school of thought in American law generated serious proposals for the imposition of sanctions. See infra notes 22, 203 and text accompanying note 217.

schools.\(^7\) In the area of race relations law,\(^8\) outsider jurisprudence frequently builds from the lived experience of people of color.\(^9\) It utilizes particularistic analysis and is hostile toward false pretensions of universality and neutrality.\(^10\) Its general orientation is pragmatic,\(^11\) and its mission is to combat racism and injustice. From this perspective, rules affecting race relations depend for their justification on the

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8 The general subject of hate speech involves a variety of issues that go beyond the issue of racist speech. I am, however, confining this article to racist speech (although I will refer to some other forms of hate speech at a few points in the Article). Accordingly, I use the term “outsider’s jurisprudence” in this article to refer only to the perspectives of people of color regarding racial issues (but not to all such perspectives; see infra note 12). Ordinarily that term would include many other perspectives that (because of the scope of my topic) are not included here, for example, that of feminist writing.

9 This aspect of outsider jurisprudence makes it narrower than the conception of critical race theory employed in Delgado & Stefancic, supra note 7 (classifying many writings as critical race theory that are neither written by people of color nor derived from the experience of people of color). In other contexts, some might well equate the part of outsider jurisprudence discussed here with critical race theory. I have no quarrel with the approach of Delgado and Stefancic; my purposes here, however, are not bibliographic, and limiting the term to the writings of people of color serves a useful purpose in this article.


10 Of course, such pretensions have been attacked not only by outsider jurisprudence, but also by critical theorists, feminists, pragmatists, and legal realists. Critical race theory differs by emphasizing the extent to which claims of neutrality and universality are in reality proxies for racist political and cultural assumptions. In the same vein, feminist jurisprudence emphasizes the gendered character of the claims to neutrality and universality.

11 It “accepts as well the pragmatic use of law as a tool of social change, and the aspirational core of law as the human dream of peaceable existence.” Matsuda, supra note 6, at 2324.
extent to which they combat the racism present in the existing set of power relations; certainly, if they entrench those power relations, the rules are not legitimate. In an effort to combat the power of racism, practitioners of outsider jurisprudence have for the most part argued for the imposition of sanctions against some forms of racist speech.\textsuperscript{12}

Unfortunately, no practitioners of outsider jurisprudence sat on the Supreme Court when the famous cross burning case, \textit{R.A.V. v. City of St. Paul},\textsuperscript{13} arrived on its docket. Partly because of their absence, the Court simply bungled the first amendment job in its most important encounter with racist speech in the last forty years.\textsuperscript{14} The United States has two first amendments. One is studied in law school. It consists of an extremely complex body of doctrine that few claim to understand. The other first amendment is, in some sense, understood by every citizen. It is an important part of the stories we tell ourselves about the meaning of America.\textsuperscript{15}

Both first amendments were tarnished in \textit{R.A.V.} In ways that have yet to be fully appreciated, the case restructured, transformed, complicated, and distorted doctrine. Because it restructured the first amendment so dramatically, and because its doctrinal adventures are set against one of the most explosive of free speech topics—the relationship between speech and race—\textit{R.A.V.} deserves sustained inquiry. Finally, \textit{R.A.V.} tells a story about the first amendment that affords a better window into the weaknesses of conservative thought on the subject than any recent case.\textsuperscript{16} Those weaknesses are particularly important, for the stories we tell ourselves about the meaning of the first amendment do more than influence the outcome of concrete cases; they also help construct the social and political identity of American citizens. Beyond tarnishing the first amendment, \textit{R.A.V.} missed opportunities to provide fresh thinking about racist speech and to provide direction for lower courts as to how they should approach these questions.

In this article, I propose to discuss first amendment doctrine and

\textsuperscript{12} I do not maintain that people of color or people on the left uniformly support hate speech regulation. \textit{See, e.g.}, Gates, \textit{supra} note 6. For purposes of this Article, from this point forward, I will use the term “outsider jurisprudence” to refer exclusively to the work of those scholars of color who favor hate speech regulation. In other contexts, however, that limitation would serve no useful purpose.

\textsuperscript{13} 112 S. Ct. 2538 (1992).

\textsuperscript{14} Prior to \textit{R.A.V.}, the most significant case involving racist speech was Beauharnais v. Illinois, 343 U.S. 250 (1952) (group libel of racial groups is not constitutionally protected).

\textsuperscript{15} For an historical perspective on the rhetoric surrounding the concept of America and related notions, see Michael Kammen, \textit{The Problem of American Exceptionalism: A Reconsideration}, 45 Am. Q. 1 (1993).

the larger symbolism of the first amendment as they relate to racist speech. In my view the argument that first amendment values (such as truth, autonomy, self-expression, and liberty) dictate that racist speech cannot be regulated is ultimately indefensible. I develop that argument at some length, but the main point of this article concerning racist speech is to open discussion about an issue that has received little attention perhaps because first amendment arguments play so large a role in our political identity. My tentative conclusion is that the racist character of our society should be considered a barrier to much regulation of racist speech, not the first amendment. I argue that regulation of racist speech that is not targeted against any specific individual or small group of individuals will be counterproductive in a society as racist as this. On the other hand, I believe that individuals who are the victims of racist speech that is targeted against them should have a right of redress even if the affording of such redress is counterproductive to themselves or to a larger group. Moreover, because I think first amendment issues are (after all the arguments are aired) of minor importance in this area, I think that the victims of racist speech should have the primary voice in determining whether sanctions should be imposed in this area. If policy in the end should turn on judgments about whether people of color would be helped or hurt by the regulations, they should have the primary voice in determining what risks they wish to take. My argument, therefore, seeks to close a discussion about the first amendment (of course, it will not) and open a discussion about the effectiveness of hate speech regulations in a racist society.

Part I of this article provides a brief description of the facts and holding of R.A.V. Part II provides a deeper description of the doctrinal architecture of Justice Scalia's majority opinion. In order to make the discussion more concrete, I compare that doctrinal structure with the approach taken in the commercial speech area and show that the two approaches are incompatible.

Part III shows a more general failure: Justice Scalia's framework provides neither a cogent explanation of the doctrinal framework of first amendment law, nor a sturdy basis for justifying R.A.V.'s result. Moreover, the Court's purported concern with content discrimination in first amendment law is thoroughly compromised.

Part IV shows what really drives the R.A.V. opinion: a particular, implicit conception of the meaning of America. Equally important, part IV contrasts this understanding with other competing explications of the meaning of America and shows that the R.A.V. opinion is at a loss to deal with them.

Part V examines Justice White's concurrence, demonstrating how the absence of an outsider jurisprudential perspective leads him into
serious error in his assessment of the St. Paul ordinance. Part V also takes issue with Justice White's apparent focus on injury, arguing that injury should be neither a necessary nor a sufficient condition for the imposition of sanctions. Finally, part V explores Justice White's suggestion that the "fighting words" doctrine does not require the prospect of violence and argues that some personal insults should lose constitutional protection whether or not a breach of the peace is likely.

Part VI explores the question of whether racist comments that are not targeted against particular individuals or small groups of individuals should receive constitutional protection. It argues that positive first amendment values are not sufficiently breached by nontargeted racist speech to outweigh the harm caused by such speech. Nonetheless, part VI concludes that the racist character of American society makes it unlikely that racist speech regulation could be effective. In the process, part VI proposes a different conception of the meaning of America from those implicit or explicit in the opinions of Justices Scalia and White and in the St. Paul ordinance: one that overlaps with, but is somewhat different from, that of outsider jurisprudence. In conclusion, part VII retraces how these different understandings of the meaning of America might bear on resolving racist speech issues.

I

R.A.V.: THE FACTS AND THE HOLDING

During the night of June 21, 1990, a group of teenagers burned a cross within the fenced portion of the yard of a black family that lived in a predominantly white neighborhood in St. Paul, Minnesota. 17 One of the perpetrators, "R.A.V.," was prosecuted under a broadly worded hate speech ordinance, 18 which he challenged on first amendment grounds. The Minnesota Supreme Court rejected the challenge, 19 and the U.S. Supreme Court granted certiorari. 20


18 Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

19 464 N.W.2d at 509-11.

Justice Scalia's opinion for the Court accepted the Minnesota court's construction of the ordinance,\(^{21}\) which limited its scope to those "fighting words"\(^{22}\) based on race, color, creed, religion, or gender.\(^{23}\) Moreover, Justice Scalia purported not to reach the question of whether the fighting words doctrine should be reconsidered or whether the ordinance could constitutionally reach all of the expression it sought to proscribe.\(^{24}\) Instead, the principal defect he spied in the ordinance was that it discriminated on the basis of subject matter:

\[\text{[E]ven as narrowly construed by the Minnesota Supreme Court, the ordinance is facially unconstitutional. ... Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.}\]

No doubt, Justice Scalia was right: the ordinance exhibited both content discrimination and subject matter discrimination on its face.\(^{25}\) Moreover, Justice Scalia determined that the St. Paul scheme embraced a form of point-of-view discrimination as well:

\[\text{One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has}\]

\(^{21}\) 112 S. Ct. at 2542.

\(^{22}\) "Fighting words" is a category of speech that has long been declared to be beneath the protection of the first amendment. See Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (no first amendment protection for "words ... which by their very utterance inflict injury or tend to incite an immediate breach of the peace"); R.A.V., 112 S. Ct. at 2541. Despite the fact that the Court often cites Chaplinsky with approval, it is often suggested that Chaplinsky is no longer good law on the ground that the Court has not since upheld a single fighting words conviction. See, e.g., Nadine Strossen, Regulating Racist Speech on Campus: A Modest Proposal?, 1990 Duke L.J. 484, 510. The suggestion is itself technically inaccurate. See Lucas v. Arkansas, 423 U.S. 807 (1975), dismissing Lucas v. State, 520 S.W.2d 224 (Ark. 1975) (dismissing for lack of a substantial federal question, after a prior remand, an attack on a fighting words conviction under a statute that prohibited "profane, violent, vulgar or abusive ... language [that] must in its common accept[ance] be calculated to arouse the person about or to whom it is spoken or addressed, or to cause a breach of the peace or assault," 520 S.W.2d at 225). More importantly, the lower courts have frequently upheld post-Chaplinsky convictions under the fighting words doctrine. See Strossen, supra, at 512. That the few Supreme Court fighting words cases have been decided in favor of defendants does not speak to the overall standing of the Chaplinsky doctrine. For better or worse, the doctrine is alive and well.

\(^{23}\) R.A.V., 112 S. Ct. at 2542; see supra note 18 (quoting the ordinance).

\(^{24}\) Id.

\(^{25}\) Id. at 2547.

\(^{26}\) A statute forbidding false statements would involve content discrimination, but not subject matter discrimination, on its face.
no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules.\textsuperscript{27}

But that was not the end of the matter. Justice Scalia entertained the argument that point-of-view discrimination might be permissible if a sufficiently powerful justification were provided.\textsuperscript{28} St. Paul argued that the ordinance was justified despite any point-of-view discrimination "because it is narrowly tailored to serve compelling state interests."\textsuperscript{29} Justice Scalia recognized that helping to safeguard the basic human rights of groups historically subject to discrimination was a compelling state interest.\textsuperscript{30} He argued, however, that clearing the compelling state interest test did not take the ordinance the full distance. He maintained that the "danger of censorship" presented by a facially content-based statute\textsuperscript{31} required a showing that such a statute was necessary to serve a compelling state interest.\textsuperscript{32} The ordinance failed this test, he concluded, because of the "existence of adequate content-neutral alternatives . . . An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect."\textsuperscript{33} In other words, a pure fighting words statute would avoid the impermissible discrimination.\textsuperscript{34}

II
COMMERCIAL SPEECH AND RACIST SPEECH

Although I propose to show that Justice Scalia's opinion has many weaknesses, its basic premise is sound: Although many forms of speech have been described as unprotected (such as obscenity and some forms of defamation), the purported status of a category of speech as "unprotected" does not necessarily justify discrimination within the category. It would, for example, be unconstitutional to tack on additional penalties just because the victim of an unprotected form of defamation was a Republican.\textsuperscript{35} More difficult to determine is the test to apply when content discrimination

\textsuperscript{27} \textit{R.A.V.}, 112 S. Ct. at 2548.
\textsuperscript{28} \textit{Id.} at 2549-50.
\textsuperscript{29} \textit{Id.} at 2549.
\textsuperscript{30} \textit{Id.} He also stated that the ordinance "can be said to promote" the compelling state interests. \textit{Id.} It is surprising that Justice Scalia was apparently prepared to accept this meager showing ("can be said to") under his strict scrutiny standard. Even the showings required in commercial speech and time, place, or manner contexts are somewhat more demanding. Board of Trustees v. Fox, 492 U.S. 469, 476-81 (1989) (restrictions must be "narrowly tailored").
\textsuperscript{31} \textit{R.A.V.}, 112 S. Ct. at 2549 (quoting Leathers v. Medlock, 499 U.S. 439, 448 (1991)).
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} \textit{Id.} at 2550.
\textsuperscript{34} Cf. Lawrence, \textit{Hate/Crimes}, supra note 6, at 712 n.149 (majority opinion implied that it would have upheld an ordinance that prohibited all fighting words).
\textsuperscript{35} It makes little difference whether this result is described as violating equal protection, the equality dimension of the first amendment, or both.
takes place within a category of unprotected speech. Justice Scalia maintains that the appropriate test to apply is a form of strict scrutiny, but some doctrinal savagery is required in order to make that conclusion presentable.

Consider, for example, the commercial speech case of Posadas de Puerto Rico Associates v. Tourism Co. Discussion of that case should be helpful in filling out important details of Justice Scalia's analysis as well as some of the obstacles to its success. There, Puerto Rico engaged in a blatant form of subject matter discrimination. It permitted commercial advertisements generally and advertisements for horse racing, the lottery, and cockfighting in particular. Nonetheless, it prohibited advertising of casino gambling to Puerto Rican residents.

In testing the constitutionality of this discriminatory approach, the Court did not utilize any form of strict scrutiny. It was enough for the Posadas Court that the legislature "felt that ... the risks associated with casino gambling were significantly greater than those associated with the more traditional kinds of gambling." In dissent, Justice Brennan objected to the Court's use of relaxed standards, observing that the record disclosed no legislative finding concerning the comparative ill effects of casino and other forms of gambling.

A case like Posadas raises a difficult question for Justice Scalia's approach: If relaxed standards are employed to deal with subject matter discrimination within a category of protected speech (even recognizing that commercial speech is less protected than other forms of protected speech), how can one justify strict scrutiny for the examination of subject matter discrimination within a category of unprotected speech?

Justice Scalia does not directly respond to this question, but he does maintain that "the prohibition against content discrimination ... applies differently in the context of proscribable speech than in the area of fully protected speech." Specifically, he points to four circumstances in which content discrimination is permissible. None of those circumstances, however, distinguishes Posadas.

A. The Reason for the Lower Level of Protection

Justice Scalia first observes that "[w]hen the basis for content dis-

36 112 S. Ct. at 2549-50.
38 Id. at 342.
39 Id. at 335. The Puerto Rican scheme also discriminates on the basis of audience, but that discrimination is not relevant for present purposes.
40 Id. at 343.
41 Id. at 353 n.3.
43 R.A.V., 112 S. Ct. at 2545.
criminalization consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." He provides an example from the commercial speech area. A state could "choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection . . .) is in its view greater there." In Scalia's view, such subject matter discrimination would be unproblematic because no idea or viewpoint discrimination is present. Instead, the justification for the regulation is the risk of fraud, and the risk of fraud is itself one of the reasons that commercial speech is proscribable.

How does Posadas fit into this analysis? Not very well. The advertising of casino gambling is not based on any of the reasons that justified the lower place commercial speech occupies in the hierarchy of first amendment values. In developing the commercial speech exception, the Court first attempted to justify treating deceptive, misleading, or fraudulent speech differently from other forms of protected speech because of the durability or hardiness, and the verifiability, of commercial speech. But these justifications do not warrant a ban on advertising involving true commercial speech such as was present in Posadas. Indeed, apart from declaring that commercial speech traditionally gets less protection, or invoking "common-sense," worrying that the treatment of commercial speech on a par with noncommercial speech would "dilute" the speech that really counts, the Court has not provided an explanation for the lesser protection of commercial speech. It has not justified the tradition, explained the common sense, or provided the reasons why dilution would come about.

Consider now why Puerto Rico was said in Posadas to oppose the advertising of casino gambling. According to the Tourism Company's brief, it did so not for fear of fraud, but for fear of "the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime." I dare say none of these reasons were the kinds of

44 Id.
45 Id. at 2546 (citations omitted).
48 Id. at 455-56.
49 Id. at 456.
50 I do not mean to question the Court's conclusion, merely its justificatory prowess.
reasons invoked to justify the commercial speech exception. Nonetheless, the Court applied a test that, as Justice Brennan observed, was a relaxed standard. It was enough to advance directly a substantial governmental interest by means no more extensive than necessary to serve that interest, and the application of that test in Posadas was even less strict than it sounded.\(^5\) In any event, strict scrutiny it was not. If strict scrutiny was not appropriate in Posadas, we are owed an explanation as to why it was appropriate in R.A.V.

B. Secondary Effects

Justice Scalia's second exception is the "secondary effects" doctrine:

Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular "secondary effects" of the speech, so that the regulation is "justified without reference to the content of the . . . speech."\(^5\)

Renton v. Playtime Theatres, Inc.\(^5\)\(^4\) is an important example of the "secondary effects" principle. Renton upheld an ordinance that zoned adult bookstores and theaters differently than it did other bookstores and theaters.\(^5\)\(^5\) The City of Renton said it passed the ordinance not primarily out of concern for the content of the films or the direct response of audiences to such films, but rather out of concerns for "secondary effects" such as the deterioration of neighborhoods (crime, property values, the environment).\(^5\)\(^6\) Because the city's alleged purposes focused on "secondary effects," the Court did not classify the ordinance as content-based.\(^5\)\(^7\)

Renton's failure to recognize the ordinance as content-based is quite remarkable. The result of the "secondary effects" doctrine after all is that some communities like Renton may let Bambi show in your local theater while excluding sexually explicit films.\(^5\)\(^8\) Moreover, a strong part of the justification for stringent scrutiny of regulations directed at content has been that hostility toward the speech may lie

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\(^{52}\) For discussion, see Board of Trustees v. Fox, 492 U.S. 469, 476-81 (1989).


\(^{54}\) 475 U.S. 41 (1986).

\(^{55}\) Id. at 44.

\(^{56}\) Id. at 48.

\(^{57}\) Id. at 47-50.

\(^{58}\) Not all communities have received the deferential treatment afforded to Renton. For discussion of many of the lower court cases, see Kimberly R. Smith, Comment, Zoning Adult Entertainment: A Reassessment of Renton, 79 CAL. L. REV. 119 (1991).
behind the recitation of other interests. Indeed, substantial grounds exist for believing that the Renton City Council in fact passed its ordinance out of hostility toward sexually explicit films.

A more generous reading of Renton (with some support in subsequent opinions) might focus on the interests put forth by the state (rather than its motivation) and ask whether those interests are jeopardized by the communicative impact of the activity the state seeks to regulate. Thus, one could argue that the prostitution associated with


60 As Justice Brennan pointed out in dissent, the findings initially put forth by the City of Renton exhibited hostility to the messages emanating from adult theaters. 475 U.S. at 59. For example, one finding was that the

[1]ocation of adult entertainment land uses on the main commercial thoroughfares of the City gives an impression of legitimacy to, and causes a loss of sensitivity to the adverse effect of pornography upon children, established family relations, respect for marital relationship and for the sanctity of marriage relations of others, and the concept of nonaggressive, consensual sexual relations.

Id. at 59 n.3. Additionally, the City determined that the “[1]ocation of adult land uses in close proximity to residential uses, churches, parks, and other public facilities, and schools, will cause a degradation of the community standard of morality. Pornographic material has a degrading effect upon the relationship between spouses.” Id.

Significantly, the findings involving “secondary effects” were added after the litigation was filed. Id. at 56-57. Despite the prelitigation findings of the Renton City Council, the Court determined that the post-litigation findings represented the predominate intent of the City Council. Id. at 47-48. The Court reasoned in part that if the city “had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location.” Id. at 48 (quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 82 n.4 (1976) (Powell, J., concurring)). Of course, it would have done no such thing. To outlaw adult theaters or to limit the number of adult theaters would be to outlaw or set quantitative limitations on nonobscene protected speech. If the city were hostile to the content of adult movies, it would have been ill-advised to enact legislation so obviously vulnerable to constitutional challenge. Its failure to enact such legislation sheds no light on its motivation.

Moreover, the emphasis on motivation is itself questionable. See, e.g., William E. Lee, Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression, 54 Geo. Wash. L. Rev. 757 (1986) (focus on motive or content as traditionally understood provides insufficient protection for free speech); Martin H. Redish, The Content Distinction in First Amendment Analysis, 94 Stan. L. Rev. 119 (1981) (same); Susan H. Williams, Content Discrimination and the First Amendment, 139 U. Pa. L. Rev. 615 (1991) (same). Whatever the motivation of the Renton City Council, the impact of the ordinance would be the same. See Geoffrey R. Stone, Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U. Chi. L. Rev. 81, 111-12 (1978) (arguing that the impact is not viewpoint neutral in that such restrictions operated against speech that encourages relaxed sexual mores).

It seems clear that justification of the result in Renton must turn to some degree on the character of the speech. See Renton, 475 U.S. at 49 (suggesting that Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), may be confined to businesses that sell sexually explicit materials and opening the door to the argument that Renton is limited in the same way). It also seems likely that the ordinance would restrict speech that encourages the subordination of women. Having argued that the method of Renton is difficult to justify, I have not argued against its result.
adult theaters—and the resulting decline of property values—is caused not by the communicative impact of the activity, but by the physical concentration of potentially receptive clients. This reading, however, has significant difficulties. First, it should not make a difference that the state regulates the content of a film because that content draws people to the theater rather than because of the impact the film has upon them once they get there. More important, the causal analysis of this argument is at least open to question. It is difficult to believe that the erotic arousal caused by the content of the films is unconnected with the sexual commerce that follows.

But let us assume that Renton and the "secondary effects" doctrine are models of constitutional analysis. Does Renton, so conceived, shed light on the relationship between Posadas and R.A.V.? Certainly, many of the state concerns in Posadas, local crimes, prostitution, corruption, and organized crime are Renton-like. Nonetheless, the Posadas case is not on a par with Renton. To make the cases more alike, Renton would need to have involved the advertising of adult theaters. Under those circumstances, however, it becomes more difficult to see Posadas as a "secondary effects" case. For the advertisements to cause the harm of concern to Puerto Rico, the message would have to directly persuade its audience to gamble. Moreover, one of the principal interests argued by the Tourism Company, the disruption of moral and cultural patterns, would seem to follow directly from an audience response to the advertisements: If the advertisements persuade Puerto Ricans to gamble, their morality will be undermined, and the culture subsequently damaged. In other words, the state seems concerned about the morality of casino gambling, but not the morality of cockfighting, and it therefore outlaws the advertising of one, but not the other. Obviously, that is point-of-view discrimination.

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61 This would not put the two on a par either because in the proposed hypothetical, the advertisement is for a constitutionally protected film; casino gambling, on the other hand, is not constitutionally protected.


So long as the justifications for regulation have nothing to do with . . . the actual films being shown inside adult movie theaters, we concluded that the regulation was properly analyzed as content neutral.

Regulations that focus on the direct impact of speech on its audience present a different situation. Listeners' reactions to speech are not the type of "secondary effects" we referred to in Renton.

63 Posadas, 478 U.S. at 341. Of course, the Court could ignore directly content-based interests as it did in Renton. See supra note 60.
C. Incidental Effects

Justice Scalia unhelpfully combines a third category of cases, the "incidental effect" cases, with the "secondary effects" line of cases.64 Under the "incidental effect" theory, if a statute is directed at conduct generally and hits speech incidentally as one form of the conduct, there is no content or subject matter discrimination of first amendment interest because the statute is not directed at speech.65 So, as Justice Scalia recognized, if a legislature prohibits sexual harassment (whether by physical or symbolic means), the imposition of penalties for sexually harassing speech would not violate any first amendment prohibition against content discrimination.66 Similarly, it would seem to follow that if St. Paul were to prohibit racial harassment (whether by physical or symbolic means), the imposition of penalties for racially harassing speech would not violate any first amendment prohibition against content discrimination. Although this feature of the opinion is obviously significant, the incidental effect principle upon which it relies does not distinguish Posadas, because the Puerto Rican statute in Posadas was directed exclusively at speech, that is, commercial advertising of a certain sort.

D. The Catch-All Category

Finally, Justice Scalia suggests that there might be another exception for cases where "there is no realistic possibility that official suppression of ideas is afoot."67 Posadas hardly qualifies for this exception because the hostility to the idea of participating in casino gambling literally screams out from the recitation of the legislature's interests in morality and the culture. In the end, it seems obvious that Posadas cannot be passed off under any of Justice Scalia's exceptions.

III

Content Discrimination and R.A.V.

The irreconcilability of R.A.V. with Posadas is part of a larger failure. Justice Scalia's framework provides neither a cogent explanation of the doctrinal framework of first amendment law, nor a sturdy basis
for justifying the result in R.A.V. In attempting an overview of the exceptions he parades, Justice Scalia suggests that each provides a basis for concluding that the subject matter restrictions which have been upheld are not “even arguably ‘conditioned upon the sovereign’s agreement with what a speaker may intend to say.’” 68 Or, as he also puts it: “[T]here is no realistic possibility that official suppression of ideas is afoot.” 69 This description of the case law breathes new life into the expression about ostriches hiding their heads in the sand. When the government outlaws threats against the President, 70 advertisements for casino gambling 71 or alcoholic beverages, or the burning of draft cards, 72 or when it engages in a campaign of zoning adult theaters out of neighborhoods, 73 no one but a person wearing a black robe with a strong will to believe or befuddle could possibly suppose that “there is no realistic possibility that official suppression of ideas is afoot.” 74 Point-of-view discrimination permeates these categories. If point-of-view discrimination were as major an evil as the Court often supposes, one would think that a demanding test would have been applied in some of these cases. But many of the justices presumably share the governmental view that advertisements for casino gambling or alcoholic beverages, the burning of draft cards, and the kind of films shown in adult theaters are not worth much. They either do not look for point-of-view discrimination or devise tests that command them not to look. Perhaps they cannot see the ways in which they themselves discriminate.

But Justice Scalia was sharply on the lookout for such discrimination in R.A.V. Regrettably, he was more cavalier when it came to discussing the possibility that the St. Paul ordinance came within one of his own exceptions. Recall that Justice Scalia had allowed subject matter discrimination “[w]hen the basis for content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable.” 75 It could well be argued, as Justice Scalia recognized in footnote seven, that “the ordinance merely regulates that subclass

68 Id. at 2547 (quoting Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (Stevens, J., dissenting in part)) (citation omitted).
69 Id. at 2547.
74 R.A.V., 112 S. Ct. at 2547.
75 Id. at 2545.
of fighting words which is most likely to provoke a violent response."\(^{76}\) Justice Scalia first responded that St. Paul had not made the argument.\(^{77}\) But to make it clear that it would not have mattered if St. Paul had made the argument, he opined that it "appear[ed] unlikely" that the subclass covered by the ordinance could be so described.\(^{78}\)

Is this description really unlikely, however? Consider Justice Frankfurter's related remarks about group racial or religious libel:\(^{79}\)

Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community. From the murder of the abolitionist Lovejoy in 1837 to the Cicero riots of 1951, Illinois has been the scene of exacerbated tension between races, often flaring into violence and destruction. In many of these outbreaks, utterances of the character here in question, so the Illinois legislature could conclude, played a significant part.\(^{80}\)

Even if racial and religious insults did not specially give rise to the possibility of violence, what of the related argument that racial, religious, and gender insults are especially serious instances of the kind of "words ... which by their very utterance inflict injury"\(^{81}\) in the fighting words context.

Here we approach the heart of the matter. Justice Scalia responds:

This is word-play. What makes the anger, fear, sense of dishonor, etc. produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc. produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message. The First Amendment cannot be evaded that easily.\(^{82}\)

That the injury is caused by a distinctive message is obvious; that the first amendment prevents protection against that injury by prohibiting the message, however, is the issue to be decided. Notice that if R.A.V. were prosecuted under a nondiscriminatory fighting words statute, the offense could only be triggered by uttering a distinctive

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\(^{76}\) Id. at 2549 n.7.  
\(^{77}\) Id.  
\(^{78}\) Id.  
\(^{79}\) Gender insults are more complicated because they involve a number of subclasses. In any event, the Court only needed to look at racial insults for purposes of this argument, and it is on particularly weak ground when that is the focus.  
\(^{82}\) R.A.V., 112 S. Ct. at 2548.
message. Absent unusual circumstances, if R.A.V. insulted a person’s
driving ability, a jury could reasonably find that no fighting words
were present. If R.A.V. insulted a person’s race, however, the distinc-
tive character of the message would contribute to a jury determination
of a fighting words violation. Thus a jury could determine that racist
speech was especially damaging. The puzzle is why the St. Paul City
Council could not do the same. It is simply not the case that the first
amendment absolutely prohibits the regulation of injuries caused by
messages. Indeed, Justice Scalia’s suggestion that a fighting words
statute is a content-neutral alternative to the St. Paul ordinance author-
izes the ad hoc application of such a statute’s terms to distinctive
messages.

Justice Scalia does not clearly deny that the injuries of concern in
the ordinance are qualitatively different than the kinds of injuries trig-
gered by fighting words as a class. The closest he comes to discussing
the point is where he builds on an assertion that the fighting words
category implicates an unacceptable “mode of expressing whatever
idea the speaker wishes to convey.” He then says that

St. Paul has not singled out an especially offensive mode of expres-
sion—it has not, for example, selected for prohibition only those
fighting words that communicate ideas in a threatening (as opposed
to a merely obnoxious) manner. Rather, it has proscribed fighting
words of whatever manner that communicate messages of racial,
gender, or religious intolerance. Selectivity of this sort creates the
possibility that the city is seeking to handicap the expression of par-
ticular ideas.

Precisely. But quite beside the point. If the argument is that a
particular subject matter implicates the very risks the category was
designed to cover, but in a more severe way, what difference does it
make that the category of speech involved is not the most offensive
mode of speech. The question is whether it causes the most serious
form of injury. Since when is the mere possibility of idea discrimina-
tion in regulating less than fully protected speech of such enormous
constitutional import?

Obviously, it would have been easy enough to write an opinion in
which the existence of the state’s substantial interest in deterring rac-
cial, religious, and gender injuries was sufficient to justify the ordi-
nance. Claims that the ordinance was motivated by opposition to the
content could have been swept aside by reference to the kinds of de-
VICES used in cases involving commercial speech or adult theaters.

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83 Id. at 2549 (emphasis added).
84 Id. (emphasis added).
It would not have been an occasion for "dancing in the streets" if the Court had resorted to any such device, however. Intellectual dishonesty is no virtue. There is no point in pretending that St. Paul lacked hostility to the underlying message. Of course, St. Paul was hostile to the messages it sought to criminalize—which is not to deny that the injuries were of concern to those who passed the ordinance. The question is whether and when such hostility should be constitutionally fatal.

Justice Scalia's apparent response to the question is that such hostility is constitutionally fatal if the Court is prepared to recognize its existence and if the legislation in question is unable to pass a test of strict scrutiny. But this analysis is unduly simplistic. We have already seen that the Court has not subjected subject matter discrimination within categories of speech receiving less than full protection to the kind of strict scrutiny that Justice Scalia supposes is the usual first amendment standard. Even if Justice Scalia's recharacterization of the cases involving less than fully protected speech were on the mark, there would be no easy skip to the conclusion that strict scrutiny was appropriate.

Strict scrutiny is ordinarily employed when the state attempts to use content discrimination against otherwise protected speech, for example, to regulate the time or place in which such speech can be uttered. Thus, when Chicago prohibits speech near a school except speech pursuant to a labor dispute, the Court employs strict scrutiny to test the constitutionality of the content discrimination.

But idea discrimination is not always a constitutional sin, and strict scrutiny is not a given. In determining that obscenity or some forms of defamation are unprotected, for example, the Court has forthrightly balanced or deferred to the interests proffered by the state. Why, then, is strict scrutiny appropriate for racist speech in the form of fighting words, but not for defamation or obscenity?

Consider obscenity. The Court in *Paris Adult Theatre I v. Slaton* asserted that the distribution of obscene material is not protected under the first amendment because it debases human personality, violates the social interest in morality, and interferes with the state's

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86 *R.A.V.*, 112 S. Ct. at 2549.
87 Chicago Police Dep't v. Mosley, 408 U.S. 92 (1972).
88 *Id.*
89 413 U.S. 49 (1973).
90 *Id.* at 63.
91 *Id.* at 61.
right to maintain a decent society. In short, it is not good speech; it is not valuable. Whatever slight value it may have is said to be outweighed by "the social interest in order and morality." Indeed the very definition of obscenity is filled with decisions about value. To be obscene, material first must appeal to prurient interests; second, must be a patently offensive depiction or description of sexual conduct; and third, must not have "serious literary, artistic, political, or scientific value."

The third prong of the test is obviously phrased in terms of value. The prurient interest part of the test, however, is an especially clear example of point-of-view discrimination. Appeals to prurient interest are defined as appeals to a "shameful or morbid interest in nudity, sex, or excretion," and cannot be taken to include appeals to "normal" interests in sex. That is, appeals to interest in "good, old fashioned, healthy" sex are constitutionally protected even if they are patently offensive to contemporary standards and lack serious literary, artistic, political, or scientific value. Appeals to "abnormal" interests in sex are criminalized when the other requirements are satisfied.

If it is fair to ask whether obscenity's contribution to truth is outweighed by the social interest in order and morality and to base an answer upon what a legislature could quite reasonably determine (a far cry from strict scrutiny), then why are the same question and scrutiny inappropriate for racist speech? If obscenity can be judged by whether it jeopardizes the "right... to maintain a decent society," why is racist speech not subjected to the same test?

92 Id. at 69.
95 Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1985) (quoting MODEL PENAL CODE § 207.10(2) (Tentative Draft No. 6, 1957)).
96 Id. at 499.
97 Id.
98 Id. The treatment of such appeals thus discriminates on the basis of point of view. For examples of other exercises of legally permissible point-of-view discrimination together with a perceptive discussion of determining what should count as point-of-view discrimination, see Cass R. Sunstein, Pornography and the First Amendment, 1986 DUKE L.J. 589, 609-17.
Perhaps the answer is that the suppression of obscenity does not involve the suppression of "ideas." But this is "word-play." To distinguish between decent sex and morbid sex is obviously point-of-view discrimination. Moreover, opponents of obscenity object to a variety of themes: the notion that sex is a casual affair, the idea that sex is an "animal connection" rather than a human relationship, and the need for a public morality.

Obscenity law, then, is an instance in which content discrimination, subject matter discrimination, and point-of-view discrimination coincide, yet strict scrutiny is not employed and the legislation is not invalidated. This leaves two possible responses. One might be: "So much the worse for obscenity law. Let us get rid of it." No doubt many liberals would take that view, but it is not clear that any member of the current Court is prepared to afford obscenity full constitutional protection—and certainly not Justice Scalia. Justice Scalia needs to reconcile his approach to racist speech with his approach to obscenity.

Alternatively, one might argue that unlike racist speech, obscenity is not political (except for obscenity that has political value but not enough to deserve the label of "serious" political value) and that political speech is particularly privileged. Here much depends on the definition of "political." Assume for the moment that feminist conceptions of the political are ignored (so that obscenity is nonpolitical). Is it clear that a racist insult implicates politics? We can assume the perpetrator of a racist insult holds politically controversial

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100 It also has disturbing implications for the first amendment status of art and music. Consider Harry Kalven, Jr., The Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1, 16: [B]eauty has constitutional status too, the life of the imagination is as important to the human adult as the life of the intellect. I do not think the Court would find it difficult to protect Shakespeare, even though it is hard to enumerate the important ideas in the plays and poems. I am only suggesting that Mr. Justice Brennan might not have found it so easy to dismiss obscenity because it lacked socially useful ideas if he had recognized that as to this point, at least, obscenity is in the same position as all art and literature.

101 See supra text accompanying note 82.

102 On the latter two themes, see Irving Kristol, Reflections of a Neoconservative 45, 47 (1983).

103 See Harry M. Clor, Obscenity and Public Morality 223 (1969) ("The law's retreat to hard-core pornography would ... involve a substantial lowering of public standards."). The interest in preventing women from being treated as sex objects was regarded as an interest that justified the prohibition of too narrow a class of material. See id. at 222-23.

104 Paris Adult Theatre I, 413 U.S. at 61 (deferring to the Georgia legislature on the question of whether obscenity contributes to crime).

105 In particular, see FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 250-53 (1990) (Scalia, J., dissenting in part) (arguing that a business devoted to the sale of highly explicit sexual material can be closed down, not merely zoned to a particular part of the community).

106 See generally Feminists Theorize the Political (Judith Butler & Joan W. Scott eds., 1992) (capacious conceptions of the political).
views, but we can also assume that the disseminator of obscene materials holds politically controversial views about the themes contained in the materials. Does this make either of them political?

In a sense, the answer does not matter because the underlying assumption of the political argument (that strict scrutiny applies to political speech and that point-of-view discrimination is not permitted) is itself misplaced. The law of defamation, much of which involves political speech, makes this point clear. The rhetoric of strict scrutiny has not been employed in defamation cases. Rather, the Court has balanced the interest in reputation against the interests in freedom of expression, and that balancing process has produced a complex set of rules. Perhaps defamation can be distinguished from racist speech on the ground that the former does not involve idea discrimination. Notice, however, that defamation involves a form of content discrimination that has predictable discriminatory impact. If you say nice things about powerful people, the defamation laws will not bite you; if you say critical things, you are at risk. To be sure, this is content-neutral in that any defamatory criticism is subject to these laws (no particular ideas are singled out), but the general deterrence of criticism is arguably as serious a concern as the deterrence of a particular defamatory statement.

Perhaps more serious from a first amendment perspective, defamation laws, like “pure” fighting words statutes, can not be enforced without the authorization of ad hoc point-of-view discrimination by judges and juries. In many defamation trials, the state must determine (often with the help of a jury) whether particular critical statements are true or false. These statements may involve public officials, public figures, or private persons. They may be of vital import in the marketplace of ideas. Nonetheless, the judicial branch of government makes an official determination as to whether the point of view expressed by the defendant about the plaintiff is true or false and, if false, whether subject to monetary sanctions if the views are deemed to be false. This official governmental determination of truth and falsity is pure point-of-view discrimination. Moreover, the impact of this process is not confined to trials. Anyone publishing a critical state-

108 For example, public officials and public figures must show that defamatory statements were published as a knowing or reckless falsehood in order to recover; private persons must show negligence in order to recover against media defendants. See id. Private persons may recover presumed and punitive damages against nonmedia defendants, at least when the matter is of private interest, without a showing that the statement was published as a knowing or reckless falsehood, see Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), but may or may not be able to do so against media defendants with similar publications. Compare Gertz, 418 U.S. 323, with Greenmoss.
ment about someone he or she believes might sue must take into account what a typical jury is likely to think about that statement. As a consequence, some critical statements are easier to make than others. Obviously, this entire process deeply implicates first amendment values.

It is, therefore, a nonstarter to suggest that under the defamation laws, "ideas" are (or should be) protected, and only statements of fact subjected to scrutiny.\footnote{Compare Gertz, 418 U.S. at 339-40 (ideas absolutely protected under the first amendment) with Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990) (denying that there is any "wholesale defamation exception for anything that might be labeled 'opinion'").} This just leads to the question of why ideas are more important than assertions of fact. Surely assertions of fact make important contributions to our understanding of society and its government. Assertions of fact are afforded a measure of protection under the first amendment; no one has put forth a compelling argument that they are less important than ideas. Assuming we could define an "idea" in the first place, we would be at a loss to explain why facts or assertions thereof are less important. Indeed, a major part of the rationale for protecting opinions (as opposed to facts) in defamation law has been that they say so little that a jury cannot reliably determine their truth or falsity.\footnote{See, e.g., Marc A. Franklin & Daniel J. Bussel, The Plaintiff's Burden in Defamation: Awareness and Falsity, 25 WM. & MARY L. REV. 825, 879 (1984) (opinions should be equated with nondisprovable assertions); Jeffrey E. Thomas, Comment, Statements of Fact, Statements of Opinion, and the First Amendment, 74 CAL. L. REV. 1001 (1986) (contending that the distinction between facts and opinions in the case law is rooted in "verifiability").} A marketplace of ideas without facts would be bankrupt. The intrusion of defamation laws into the marketplace of ideas and facts discourages many true assertions of fact and entails a genuine and undeniable first amendment loss.

My point, however, is not that defamation laws should be regarded as unconstitutional. My point is that defamation laws permit point-of-view discrimination—without applying strict scrutiny—because the interest in reputation is thought to outweigh the right of freedom of expression in particular contexts.

Does racist speech differ? Racist speech laws single out particular ideas for special regulation; defamation laws do not. This no doubt is a distinction. However, since (as I have argued) defamation laws license ad hoc point-of-view discrimination by juries and likely cause writers and publishers to take the potential unpopularity of their positions into account in deciding whether to publish critical statements, this distinction seems to make little difference. To discern whether it does, we need a firmer grip on what is wrong with idea or point-of-view discrimination in the first place.
Justice Scalia's opinion does not provide much assistance. He maintains that the rationale of the prohibition against content discrimination is the "specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." That concern, however, is difficult to take seriously in the context of *R.A.V.* St. Paul prohibited only a small class of "fighting words," words which make a slight contribution to truth—just a particular socially unacceptable mode of presentation in Justice Scalia's view. It is hard to see how that raises the "specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.”

Even more telling is Justice Scalia's "content-neutral" alternative to the St. Paul ordinance: a "pure" fighting words statute, which, he maintains, could serve the valid government interest in protecting basic human rights of members of groups historically subject to discrimination. But this content-neutral alternative would drive the very same ideas and viewpoints (along with others) from the marketplace. Thus, Justice Scalia cannot plausibly claim to be concerned about this result.

However facially content-neutral a fighting words statute might appear to Justice Scalia, juries or judges would inevitably make content-based judgments in applying the statute. Justice Scalia, for example, complains that the St. Paul ordinance discriminates between statements based on race—which it reaches—and statements based on political affiliation, union membership, and sexual orientation—which it does not. Nonetheless, under Justice Scalia's content-"neutral" ordinance, a judge or jury could make on an ad hoc basis the same type of distinction the St. Paul City Council was not permitted to encode as a rule, deciding, for example, that comments about race are fighting words, but comments about union membership or politics are not.

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114 *R.A.V.*, 112 S. Ct. at 2545.
115 *Id.* at 2550. Leave aside that if the interest is protecting members of groups that have historically been subject to fighting words, this alternative would not be "narrowly tailored" to serve that interest even under the rather relaxed standards currently employed by the Court.
116 *Id.* at 2547; see *supra* note 18 (text of St. Paul ordinance).
Nonetheless, there is something about explicit content discrimination that has piqued Justice Scalia's concern. The root of that concern (and that of other justices as well), I suspect, is at once symbolic and substantive. Justice Scalia is attracted to a particular vision of America, as a nation that spurns paternalism and tolerates different points of view, however hateful. It is a nation that is formally neutral in race relations (affirmative action programs from his perspective are undesirable), ideally neutral in the economic market (although the Constitution does not guarantee this), and neutral in the "marketplace of ideas." Of course, government will engage in programs that have differential impact on groups and ideas, but substantive equality is not the goal of the Constitution.

From this perspective, there is little to be said for general racist speech statutes such as the St. Paul ordinance. If such statutes target group libel, they are paternalistic and intolerant. If they are applied against fighting words, and if one of the rationales is that victims tend to internalize hostile messages, they can be paternalistic. If the statutes are based on hostility to the message expressed, they can be intolerant. Moreover, as Justice Scalia specifically argues, content-neutral alternatives exist to guard against the harm.

Of course, Justice Scalia's perspective is not unqualified. Government can enter the intellectual marketplace (even if it skews it in important ways) to communicate its own messages. Moreover, government can take the value of speech into account in determining its degree of constitutional protection. A model of anti-paternalism, tolerance, and neutrality has difficulty explaining why, for example, commercial speech and obscenity get less than full protection. Moreover, as we have seen, substantial point-of-view discrimination is immanent in existing law, a body of law that Justice Scalia for the most part accepts.

Beyond the doctrinal tensions, however, we should question how attractive the picture of the nation implicit in Justice Scalia's first amendment jurisprudence really is. Anti-paternalism and tolera-

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117 I do not contend, of course, that this concern is prompted by any sympathy for a person who burns a cross on the lawn of a black family in the dead of night. Nor do I think Justice Scalia had any sympathy for the flag burning defendant in Texas v. Johnson, 491 U.S. 397 (1989), where he also voted against content discrimination.

118 For criticism of this aspect of his perspective, see, e.g., Kimberle Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331 (1988).

119 R.A.V., 112 S. Ct. at 2550.


121 See supra notes 70-111 and accompanying text.

122 As Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189, 212 (1989) writes: "The Court has long embraced an 'anti-paternalistic' under-
tion are strong American values, and there is much to be said for (and against) the idea of a neutral government, particularly one which plays no favorites in the intellectual market. Justice Scalia's national picture is certainly one with deep roots in American culture.

Nonetheless, there are other important stories to be told about the nation. For example, one could describe a country which has historically evolved from a nation of slavery into a nation with a profound constitutional commitment to racial and ultimately also gender equality. Similarly, the country has evolved from a nation permitting state-established churches into a nation where religious equality is a constitutional given in every state.

These stories may be exaggerated conceptions of the country, but they are important parts of the ways we explain and tell stories about our constitutional culture. Ordinarily, these stories and ideals can innocently be held out as mutually consistent. In the racist speech context, however, these stories compete, and innocence is no longer possible.

How does one choose among convincing and plausible stories? One solution, proposed by outsider jurisprudence, is egalitarian: pick the story that benefits those who have been subordinated. I would note, however, that prominent practitioners of outsider jurisprudence balance competing stories about freedom and equality. Mari Matsuda does not advocate the ban of all racist speech; even Catharine MacKinnon does not advocate the abolition of all sexist speech. Perhaps these positions are purely strategic. For the moment, it does not matter. At a minimum, Matsuda, a strong proponent of outsider

...standing of the first amendment." For a particularly strong statement by the Court, see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1976). But see, for example, Posadas and the obscenity cases, which permit paternalistic restrictions.

123 As Stone, supra note 122, at 216, writes, "'Intolerance-based' justifications for restricting expression, like paternalistic justifications, are constitutionally disfavored, even if the restriction does not substantially prevent the communication of a particular idea, viewpoint, or item of information." On the relationship between the first amendment and tolerance, see generally Lee C. Bollinger, The Tolerant Society (1986).

124 The innocent believe it possible to discover "some sort of truth which can tell us how to act in the world in ways that benefit or are for the (at least ultimate) good of all." Jane Flax, The End of Innocence, in Feminists Theorize the Political, supra note 106, at 445, 447. For the claim that the reconstruction amendment makes certain forms of racist speech a proscribed badge of servitude, see Amar, supra note 6.

125 See infra text accompanying note 218.

126 To the contrary, see MacKinnon, supra note 6, at 106 (emphasis added): When equality is recognized as a constitutional value and mandate, the idea that some people are inferior to others on the basis of group membership is authoritatively rejected as the basis for public policy. This does not mean that ideas to the contrary cannot be debated or expressed. It should mean, however, that social inferiority cannot be imposed through any means, including expressive ones.
jurisprudence, is at pains to recognize the existence of competing stories.\textsuperscript{127}

In contrast, Justice Scalia’s approach to racist speech is relentlessly simplistic. He does not take the competing story seriously. That is why it is clear to him that a comprehensive fighting words statute is an obvious alternative to the St. Paul ordinance, despite the fact that it ignores the equality story and lacks the St. Paul ordinance’s symbolic power. Justice Scalia has a response to this, but he does not have an argument: “[T]he only interest distinctively served by the content limitation is that of displaying the city council’s special hostility toward the particular biases thus singled out. This is precisely what the First Amendment forbids.”\textsuperscript{128}

Justice Scalia’s description of the government’s interest dilutes it unfairly. St. Paul’s interest, of course, is not in allowing its city council to have a special moment of pique. Rather, it is to establish not only that religious, racial, and gender epithets are particularly harmful, but also that, as a matter of public morality, such epithets are a public disgrace.

As to the latter point, Justice Scalia insists that this kind of proclamation of public morality is precisely what the first amendment forbids.\textsuperscript{129} But this is naked assertion, a selection of one story over another. How is it that a state’s attempt to establish public morality in outlawing obscenity is not also precisely what the first amendment forbids? If interests can be balanced against each other, why can’t constitutional stories be set beside each other and accommodated?

I do not mean to suggest that Justice Scalia’s overall position is hopeless. We can only speculate, however, as to how he reconciles his positions on racist speech, obscenity, and defamation. I suspect he thinks that obscenity is nonpolitical smut unworthy of protection; that defamation, although political, causes harm for which there has traditionally been a remedy (plus, he is no fan of the press); and that racist speech is political as well (although he would agree it can be regulated if the statute is not targeted by subject matter or if it is directed at conduct generally) but not the source of traditionally-recognized or serious harm. Those who object to racist speech, he may believe, are often too thin skinned. Of course, it is one thing to assume that racist speech is political and quite another to suppose that racist speech in

\textsuperscript{127} See Matsuda, supra note 6, at 2321, 2348-56.
\textsuperscript{129} Id.
the form of fighting words is political, as if fighting words were a form of dialogue or debate in the public sphere.

The authoritarian simplicity of remarks such as "This is precisely what the First Amendment forbids" does not sit easily with the deeply compromised vision Justice Scalia actually holds. I do not mean to say that complexity can be avoided. I do mean to suggest that if content-neutrality is the first amendment emperor, the emperor has no clothes.

Once it is recognized that a reference to content-neutrality is not a conversation stopper, the City of St. Paul's story becomes difficult to dismiss abruptly. St. Paul, by passing its ordinance, said in effect:

We understand that idea discrimination is a deep intrusion into First Amendment values, but the toleration of racial, religious, and gender epithets has serious implications for equality and our public morality. Our concern about those issues is so great that a symbolic commitment to prohibiting those epithets is of more importance than the First Amendment story. Indeed, the very existence of the First Amendment story and our willingness to trump it shows how strongly our community values equality and public morality.

On this understanding, St. Paul cannot fairly be understood to have displayed little appreciation for first amendment values. Instead, it has adopted a first amendment story very different from Justice Scalia's. Recall that its ordinance, as construed by the state supreme court, applies only to fighting words. If someone gives a public speech involving racial superiority but no fighting words are addressed to any individual or small group, the ordinance does not apply. Perhaps St. Paul shares Justice Brennan's story about our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." On this understanding, St. Paul's conviction is based on appreciation for life in an exciting and diverse country. It need not be committed to the view that racial inequality might be a fine idea and that the intellectual marketplace can decide. Opposition to racial inequality was, no doubt, an important part of why it outlawed racial epithets.

This is certainly a different first amendment story than the one Justice Scalia implicitly tells, and yet all Justice Scalia can say on behalf of his own is either irrelevant (since his own alternative would drive

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130 Justice Scalia seems to make this precise assumption when he objects in R.A.V. that one side is licensed to speak one way in "debate," but the other side is precluded from doing so. See supra text accompanying note 27.

131 Cf. Foley, supra note 17, at 914 n.36 ("[B]y characterizing fighting words as a form of 'debate,' the [R.A.V.] majority legitimates hate speech as a form of public discussion.").

132 R.A.V., 112 S. Ct. at 2550.

133 See supra text accompanying note 22.

even more ideas from the marketplace than St. Paul's) or an exercise in pure fiat ("This is precisely what the first amendment forbids"). Moreover, his opinion in R.A.V. provides little direction for legislatures and lower courts on a key issue: assuming that fighting words statutes are constitutional, what are fighting words?

V

What Are "Fighting Words"?

Justice White's R.A.V. opinion, joined by three other justices, speaks to the question of what fighting words are, but in terms that need elaboration and qualification. Justice White believes the St. Paul approach was flawed not because it reached too little speech (as Justice Scalia would have it), but because it reached too much; in other words, it was overbroad. There are two problems with Justice White's argument. First, it seems clear that he misinterprets the ordinance. Second, Justice White criticizes the ordinance for not being specific enough about the nature of the injuries which would suffice to trigger sanctions. As I will argue, this focus on injury is unhelpful. Nonetheless, I will suggest (at some length) that there may be substantial merit in Justice White's further suggestion that direct personal insults (whether or not they are likely to trigger violence) are rightly distinguished from racial insults that are not targeted at particular individuals.

A. The Overbreadth Issue

In retrospect, it is more than a little odd that Justice White authored an opinion declaring the statute to be overbroad. Justice White has for many years led the Court in limiting that doctrine's reach, successfully championing the view that those whose own conduct is unprotected should not prevail in challenging a speech statute without a showing that its overbreadth is "real [and] substantial." As written, the St. Paul ordinance was surely a ripe candidate for a real and substantial overbreadth finding, but since the Minnesota Supreme Court construed the ordinance narrowly, restricting it to fighting words, Justice White's enthusiasm for the overbreadth argument is somewhat difficult to understand.

As written, the St. Paul ordinance is sweeping:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to,

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135 R.A.V., 112 S. Ct. at 2550.
137 Broadrick, 413 U.S. at 615.
a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor. 138

One need not get up too early in the morning to appreciate that placing a symbol on public or private property (with consent) "which one knows or has reasonable grounds to know arouses alarm, anger, or resentment" on the grounds specified in the ordinance might be protected in a wide variety of circumstances. Any controversial placard concerning race, gender, or religion is likely to provoke anger in others. If the St. Paul ordinance had been read for all it was worth, few would deny that the R.A.V. case presented a serious constitutional issue. 139

Justice's White opinion did not deny the power of a state court to provide a narrowing construction, 140 nor did it argue that there was anything untoward about the particular narrowing construction in R.A.V. He made no claim, for example, that the construction was so novel that the defendant could not have anticipated it. 141 In considering the overbreadth issue, then, the justices were required to take the statute "as though it read precisely as the highest court of the state has interpreted it," 142 and Justice White recognized this. 143

Here, however, Justice White went astray. While he properly examined the text of the Minnesota Supreme Court's opinion, not just that of the ordinance, his rendition of the opinion—joined by three of his fellow justices—is eccentric. According to Justice White, the Minnesota Supreme Court ruled that the ordinance prohibited fighting words, defined to include any expression that "'by its very utterance' causes 'anger, alarm, or resentment.'" 144 From that premise it was an easy ride to a conclusion condemning the St. Paul ordinance: "The mere fact that expressive activity causes hurt feelings, offense, or resentment," wrote Justice White, "does not render the expression unprotected." 145

One might be initially suspicious of this interpretation, for it is difficult to see how this interpretation could have been seen—by Justice White or by the Minnesota Supreme Court—as a narrowing con-

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138 112 S. Ct. at 2541 (quoting Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)).
139 See, e.g., Terminiello v. City of Chicago, 337 U.S. 1 (1949) (stirring people to anger protected under first amendment).
143 R.A.V., 112 S. Ct. at 2558-59 (White, J., concurring).
144 Id. at 2559.
145 Id.
struction. The ordinance, as construed by Justice White, seems to cover exactly the same speech covered by its literal terms namely, speech reasonably likely to cause anger, alarm, or resentment on the grounds specified in the ordinance.

To be sure, the Minnesota Supreme Court did say something that, left alone, would have justified Justice White's reading:

Unlike the flag desecration statue at issue in Texas v. Johnson, the challenged St. Paul ordinance does not on its face assume that any cross burning, irrespective of the particular context in which it occurs, is subject to prosecution. Rather, the ordinance censors only those displays that one knows or should know will create anger, alarm or resentment based on racial, ethnic, gender or religious bias.\(^{146}\)

If the Minnesota court had stopped there, no doubt Justice White would have been on the mark. But the court went on:

In In re S.L.J., 263 N.W.2d 412 (Minn. 1978), this court narrowly construed Minn. Stat. § 609.72, subd. 1(3) (1990), which prohibits “offensive, obscene, or abusive language or . . . boisterous and noisy conduct tending reasonably to arouse alarm, anger, or resentment in others,” (emphasis added) to refer only to “fighting words,” S.L.J., 263 N.W.2d at 419, thereby preserving it in the face of an overbreadth attack. Similarly limited to expressive conduct that amounts to “fighting words”—conduct that itself inflicts injury or tends to incite immediate violence, see Chaplinsky v. New Hampshire, 315 U.S. at 572, 62 S. Ct. at 769—the ordinance in question withstands constitutional challenge.\(^{147}\)

As this excerpt makes clear, the Minnesota Supreme Court explicitly construed “anger, alarm, and resentment” narrowly, to refer only to fighting words. It did not say, as Justice White supposed, that fighting words include any expression that “by its very utterance” causes “anger, alarm, or resentment.”\(^{148}\) Nor was the state court under the illusion, as Justice White claimed,\(^{149}\) that “the mere fact that expressive activity causes hurt feelings, offense, or resentment” is a sufficient basis for excluding speech from constitutional protection.

If there were any question about the Minnesota Supreme Court’s intentions, inspection of the case it relied upon, In re Welfare of S.L.J.,\(^{150}\) should have resolved all doubts. S.L.J. considered the constitutionality of a state disorderly conduct statute which, like the St. Paul ordinance, prohibited speech that would tend “reasonably to arouse alarm, anger, or resentment in others.”\(^{151}\) S.L.J. explicitly recognized

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\(^{147}\) Id. (emphasis added).
\(^{148}\) R.A.V., 112 S. Ct. at 2559.
\(^{149}\) Id.
\(^{150}\) In re Welfare of S.L.J., 263 N.W.2d 412 (Minn. 1978).
\(^{151}\) MINN. STAT. § 609.72(1)(3) (1992).
that the “vulgar, offensive, and insulting” character of words does not alone make them constitutionally punishable even if the “overwhelming majority of citizens” would condemn them. Therefore, it found that the statute as written did not satisfy the constitutional definition of “fighting words” and was unconstitutional on its face.

Nonetheless, the court in *S.L.J.* proceeded to construe narrowly the statute to apply only to “fighting words.” Moreover, the way it applied the doctrine made it clear that words causing resentment were not necessarily tantamount to “fighting words.” The facts before the court in *S.L.J.* involved a fourteen-year-old girl who had been questioned by police officers who had a hunch she might have been sniffing paint or stealing bicycles. After the questioning, she was told to go home because it was past her curfew. After starting down an alley to depart, S.L.J. and her friend turned around, somewhere between fifteen and thirty feet from the squad car in which the officers were sitting, and said: “Fuck you pigs.” Arrests for disorderly conduct quickly followed.

The petition against S.L.J. alleged that she had used language that she knew or had reasonable grounds to know would “tend to arouse resentment in others.” One of the officers testified: “I was mad. I was upset. They didn’t have any right to say that to me.” At the same time, the officer admitted that he did not even consider a violent response.

Although the Minnesota Supreme Court accepted the police officer’s testimony and seemed to appreciate his resentment, applying the fighting words test, it ruled that S.L.J’s speech was constitutionally protected:

Under this test, appellant’s conviction for disorderly conduct cannot stand. While it is true that no ordered society would condone the vulgar language used by this 14-year-old child, and as the court found, her words were intended to, and did, arouse resentment in the officers, the constitution requires more before a person can be convicted for mere speech. In this case, the words were di-

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152 *S.L.J.*, 263 N.W.2d at 416.
153 *Id.*
154 *Id.* at 419.
155 *Id.* at 419-20.
156 *Id.* at 415.
157 *Id.*
158 *Id.*
159 *Id.*
160 *Id.* (emphasis omitted).
161 *Id.*
162 *Id.*
163 *Id.* at 419 (“[N]o ordered society would condone the vulgar language used by this 14-year-old child . . . .”).
rected at two police officers sitting in their squad car from a distance of 15 to 30 feet by a small, 14-year-old child who was on her way home when she turned to the officers and made her statement. With the words spoken in retreat from more than 15 feet away rather than eye-to-eye, there was no reasonable likelihood that they would tend to incite an immediate breach of the peace or to provoke violent reaction by an ordinary, reasonable person. Thus, the state has failed to prove that under these circumstances the words uttered by appellant were “fighting words,” and both her conviction for disorderly conduct and the finding of delinquency based on the conviction must be reversed.164

The Minnesota Supreme Court’s reliance on S.L.J. in construing the St. Paul ordinance at issue in R.A.V. makes Justice White’s reading deeply implausible. Clearly the court in R.A.V understood that arousal to anger or resentment is an insufficient reed upon which to base criminal punishment. Clearly the court also understood the flag burning case’s doctrine that “[i]f there is a bedrock principle underly- ing the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”165 Justice White’s intimation to the contrary is flatly wrong.

This leads to a difficult question: How does one account for Justice White’s failure? One might not have expected him to go wrong here: he championed a narrow conception of the overbreadth doctrine and he has been praised for his strong analytic power.166

Is there anything about his more general constitutional perspective that could explain his opinion? Some might think that Justice White’s hostility to affirmative action might spill over to a case of this kind.167 After all, Justice Blackmun complained in his concurrence that the majority may have been influenced by “the temptation to decide the issue over ‘politically correct’ speech.”168 But Justice White’s opinion exhibits no such purpose. It is sharply critical of Justice Scalia’s majority opinion, observing, for example:

Any contribution of this [Court’s] holding to First Amendment jurisprudence is surely a negative one, since it necessarily signals that expressions of violence, such as the message of intimidation and racial hatred conveyed by burning a cross on someone’s lawn, are of

164 Id. at 419-20.
165 Texas v. Johnson, 491 U.S. 397, 414 (1989). Indeed, the Minnesota Supreme Court in S.L.J. quoted that passage from the Johnson opinion shortly after it explicated its limiting construction. 464 N.W.2d at 511.
167 E.g., Jost, supra note 166, at 66.
168 R.A.V., 112 S. Ct. at 2561 (Blackmun, J., concurring).
sufficient value to outweigh the social interest in order and morality that has traditionally placed such fighting words outside the First Amendment.  

If Justice White's performance in R.A.V. cannot be traced to his attitudes about affirmative action, it is also difficult to attribute it to anything in Justice White's more general understanding of the judicial role. Granted, admirers of Justice White understood him to be a firm opponent of any form of results-oriented jurisprudence, including outsider jurisprudence. From this perspective, the Constitution is best interpreted by a thoroughly impartial judge, committed to following the rule of law, and prepared to address the merits of each case as it is presented.

But Justice White does not approach the Constitution as if it were a blank slate. Justice White's interpretation of the Constitution provides for a judicial role limited by the need for broad deference to the state and federal governments, even when they attempt to limit freedom of speech. A judge armed with this understanding would have no incentive to decide R.A.V. against the City of St. Paul, but Justice White did. I am inclined to think that he just made a mistake.

Nonetheless, a delicious irony accompanies that mistake. If Justice White was committed to impartiality (albeit with a certain background constitutional understanding), so was Justice Thurgood Marshall (albeit with a certain different background constitutional understanding). Justice Marshall understood the Constitution to favor the powerless in general and the racially disadvantaged in particular. Whether this form of outsider jurisprudence is described as results oriented, or as impartiality within a particular background understanding, is of little moment. What is important is that Justice Marshall, unlike Justice White, would have been actively on the lookout for persuasive arguments that would have protected the victims of cross burning. It is hard to believe that Justice Marshall would have so

169 Id. at 2553 (White, J., concurring). The emphasis on violence in the quoted paragraph leaves open the possibility that Justice White might strike down campus speech codes prohibiting speech that did not involve threats. But see infra text accompanying note 189. For language suggesting that "fighting words" might be limited to threats or intimidation when people approach patients of abortion clinics, see Madsen v. Women's Health Center, 114 S. Ct. 2516, 2529 (1994).


171 Hutchinson et al., supra note 170, at 69-70.

172 Jost, supra note 166, at 64, 67.

173 So, of course, did his concurring colleagues. Oddly, so far as I am aware, no commentator on R.A.V. has called attention to this error.

174 Among other things, I very much doubt that he or his clerks read S.L.J. For a more specific discussion of S.L.J., see supra notes 151-65 and accompanying text.
blatantly misread the Minnesota opinion, and that Justice White would have persisted in his misreading once it had been called to his attention. Thus the irony: Those who admire judges like Justice White for their alleged impartiality need to recognize that attention to real world results and the diversity of possible constitutional understandings can make a vital contribution to the technical proficiency of the Court. If a voice for outsider jurisprudence had been present on the Court, Justice White's error could have been corrected before its publication.

B. The Unhelpful Search for Injury

As I have argued, Justice White would have invalidated the St. Paul ordinance at issue in *R.A.V.* based on an incorrect reading of the Minnesota Supreme Court's opinion. In addition, his suggestions for what might constitute an acceptable ordinance need considerable refinement. In *R.A.V.*, the Minnesota Supreme Court followed *Chaplin-sky v. New Hampshire*’s characterization of "fighting words" as those which "by their very utterance inflict injury or tend to incite an immediate breach of the peace."\(^{175}\) The Minnesota Supreme Court did not specify the nature of the "injury" required, other than to make it clear (albeit not to Justice White and his signatories) that anger, alarm, or resentment do not in and of themselves suffice. In fairness to the Minnesota Supreme Court, this is more than the United States Supreme Court did either in *Chaplinsky* or in any subsequent case. Thus, when Justice White observed in *R.A.V.* that the Minnesota court was "far from clear in identifying the ‘injur[y]s’ inflicted by the expression that St. Paul sought to regulate,"\(^{176}\) he cast a stone from a glass house.

Lower courts trying to make sense of this aspect of Justice White's opinion may focus on the word *injury* and come up with awkward, awful-sounding formulations requiring\(^{177}\) extreme or "really extreme" emotional distress, or distress that requires psychiatric or medical care. This approach, if adopted, would be understandable. The injuries associated with "fighting words" are often underappreciated. Indeed, a major contribution of outsider jurisprudence is to highlight


\(^{176}\) *R.A.V.*, 112 S. Ct. at 2559 (White J., concurring).

\(^{177}\) One possibility that would presumably satisfy Justice White would be one that coupled injury with the recognition that "individuals are not required to welcome unwanted speech into their homes and that the government may protect this freedom." See *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (upholding ordinance prohibiting picketing in front of and directed at a particular residence); see also *Foley*, *supra* note 17, at 910 n.26 (contending that Justice White’s *R.A.V.* opinion hints that expression that merely causes hurt feelings, offense, or resentment may not be protected when targeted at a captive audience). Nothing in Justice White’s analysis, however, suggests that only such a restriction would pass muster.
the nature and extent of the injuries caused by racist speech. But a doctrinal focus on injury obscures an important point: injury should be neither a necessary nor a sufficient condition for the imposition of punitive sanctions.

Consider first the question of whether injury should be a **sufficient** condition for the imposition of punitive (or other) sanctions. The tort of intentional infliction of emotional distress provides an apt analogy. Among other things, the tort requires showings not only (1) that severe injury was actually caused and (2) that an intent to cause emotional distress existed, but also (3) that the activity offends generally accepted standards of decency or morality or is outrageous. As Chief Justice Rehnquist observed for a unanimous Court:

> Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct is sufficiently "outrageous."

By omitting any discussion of the context in which the injury might occur, the language of Justice White's *R.A.V.* opinion seems to suggest that a showing less stringent than that required for the tort of intentional infliction of emotional distress might suffice. He seems to invite lower courts to specify the type of injury that insulting utterances might bring about, but not to address the question of whether speech was sufficiently "outrageous." But this approach is surely wrong.

Suppose a person informs his or her betrothed that he or she plans to break off the engagement in a soliloquy packed with angry, emotional, and insulting language. Assume further that it results in severe emotional injury and that the angry speaker hoped to hurt the victim. I venture that this has occurred on millions of occasions. Yet it would be surprising if our hypothetical victim could recover in tort.

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178 See, e.g., Delgado, *Words that Wound*, supra note 6, at 135-49; Lawrence, *Campus*, supra note 6, at 452-66, 482-83; Matsuda, *supra* note 6, at 2926-41.


180 *Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988). Of course, the tort has limits. *Hustler* imposed limits on the ability of public figures and public persons to recover for a mass media parody even when it was regarded as offensive and was intended to inflict emotional distress. One might also argue that the quoted language of the Chief Justice's opinion only extends to civil liability, but I do not think the argument is persuasive. First, his use of the term "civilly culpable," *id.*, may simply refer to the fact that the states generally do not impose criminal liability for the intentional infliction of emotional distress *per se*. Second, his statement may be a nod to someone like Justice Stevens, who might want to make such a distinction here. Whatever Justice Stevens' views might be, it seems unlikely that the Court would balk at a formulation of the *Chaplinsky* rule that tracked the contours of the tort of intentional infliction of emotional distress.

A court would be loath to conclude that the perpetrator's conduct was sufficiently outrageous.

If mental injury alone cannot afford a sufficient basis for tort liability, certainly it cannot be the sole basis for criminal liability, for which penalties are harsher. Mental cruelty may be a sufficient ground for divorce in some states; it would be surprising if, without more, it could justify a jail sentence.

Injury, then, should not be a sufficient condition for criminal liability; neither should it be a necessary condition. Return to the facts of R.A.V. Assume that the family witnessed the burning cross, but suffered no emotional distress. What if the family was angry or somewhat fearful, but not distressed? What if they were so much in denial as to be blasé? It may make sense for tort liability to turn on the existence of emotional distress (particularly if compensation is a major goal), but why should criminal liability in this kind of circumstance turn on the response of the victims?

Notice that the record in R.A.V. disclosed nothing about the reaction of the victims. Of course, a black family living on a residential street in a predominantly white neighborhood could reasonably interpret the appearance of a burning cross on its front lawn as a terroristic threat directed at the family as a whole or at one of its members. As the Sixth Circuit observed, "a black American would be particularly susceptible to the threat of cross burning because of the historical connotations of violence associated with the act." Cross burning might reasonably prompt "fear, anxiety, and apprehension for safety."

Neither punishment nor culpability should turn on whether the act induces a certain type of reaction from the victim. Victims should not be required to report their precise thoughts and emotions, nor should the perpetrator who intended to insult on the basis of race be exonerated simply because the victim turns out to be exceptionally hardy.

182 For discussion of their reaction, see Charles H. Jones, Proscribing Hate: Distinctions between Criminal Harm and Protected Expression, 18 WM. MITCHELL L. REV. 935, 948 (1992).
185 Cf. Harris v. Forklift Systems, Inc., 114 S. Ct. 367 (1993) (psychological injury need not be shown for "hostile environment" sexual harassment claim); 18 U.S.C. § 871 (1988) (defining federal crime of threatening President without regard to whether President was afraid, emotionally distressed, or impaired in his duties). Similarly, the law of attempts does not require success or a showing of injury as a prerequisite for the imposition of punishment; for reasons similar to those provided in the text, I would not require a showing that the victim understood the perpetrator's remarks to insult on the basis of belonging to a group historically oppressed because of its race, color, or national and ethnic origin, but I regard that as a closer question. Certainly, in a tort context it should be required. See Delgado, Words That Wound, supra note 6, at 179 (tort action for racial insult
Reconsider Chaplinsky v. New Hampshire. When Chaplinsky hurled insulting remarks at a police officer, the Court made no effort to determine the emotional reaction of the police officer or his inclination to fight under the particular circumstances.\textsuperscript{186} If that part of Chaplinsky’s approach is correct, it makes no sense to probe the specific character of the injury to the members of the African American family in \textit{R.A.V.}.

Is that part of Chaplinsky’s approach right? As a principle, I would say so, but that is a far cry from affirming either its language or its result. As I have already suggested, an utterance’s mere propensity to inflict an injury should not be sufficient to remove it from constitutional protection;\textsuperscript{187} such a rule would obviate consideration of the context of particular situations and would therefore lack a suitable constitutional foundation. People in the course of being arrested by police officers are likely to depart from the Queen’s English with great frequency; their rudeness does not deserve to be a criminal offense, and officers unable to respond coolly in such situations do not belong in law enforcement.\textsuperscript{188}

C. The Bottom Line

If Justice White’s focus on injury needs revision, another portion of his \textit{R.A.V.} opinion is somewhat more helpful, even though it too needs refinement. In footnote four, citing the majority opinion in \textit{Texas v. Johnson},\textsuperscript{189} Justice White observed that the “fighting words” doctrine applies to a “direct personal insult or an invitation to exchange fisticuffs.”\textsuperscript{190} Drawing upon this standard, and upon Branden-
While imperfect, Justice White's formulation of the fighting words doctrine has the merit of avoiding a purely pugilistic analysis which would find Chaplinsky-type injury if, but only if, the utterance would cause both a reasonable (or average) person and the actual addressee to respond with immediate violence.

Both prongs of the pugilistic analysis are problematic. First, it seems wrong to protect the actual strong victim who is willing to fight above the weaker or less aggressive victim. As Professor Shea argued almost twenty years ago, there is something deeply anomalous about a test that would "permit a state to penalize a speaker who insults a burly construction worker while forbidding the punishment of the reviler of a wheelchair-bound quadriplegic" or the fourteen-year-old defendant in S.L.J. Focusing not on the person to whom remarks are addressed, but on an abstract "reasonable" or "average" person, provides little help as long as we remain within the pugilistic analysis. Consider who this "reasonable person" will be. The definition will exclude most men and women in society even if we leave size and physical ability out of the equation; most men (maybe I am wrong, perhaps it is just millions of men) and women do not respond to insults with fists. To administer this test and allow it to help the helpless, the "reasonable person" would have to be the stereotype of a man in a rowdy bar (who has yet to drink enough to lose the mantle of reasonableness). The symbolic impropriety of protecting women, for example, by using the stereotype of any man as a proxy—all under the label of reasonableness or

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193 Under this view, the state could arguably not punish such statements if they were made on the telephone. See Anniskette v. State, 489 P.2d 1012, 1014-15 (Alaska 1971) (available cooling-off period defeats fighting words finding).
194 Thomas F. Shea, "Don't Bother to Smile When You Call Me That"—Fighting Words and the First Amendment, 63 Ky L.J. 1, 2 (1975).
195 Nonetheless, that seems to be the implication of Gooding v. Wilson, 405 U.S. 518, 523 (1972) (requiring that fighting words convictions be based on circumstances in which the actual addressee was likely to fight). But cf. Ashton v. Kentucky, 584 U.S. 195, 200 (1966) (use of subjective standard is erroneous because it "involves calculations as to the boiling point of a particular person or a particular group").
196 See generally Shea, supra note 194 (recommending a focus on the average person).
197 Gard, supra note 188, at 554-56; cf. KENT GREENAWALT, SPEECH, CRIME AND THE USES OF LANGUAGE 295-98 (1989) (fighting words standard is gendered); Lawrence, Campus, supra note 6, at 484 (paradigm is based on white male point of view); Lawrence, Hate/ Crimes, supra note 6, at 710 (standard is probably gendered); Kathleen M. Sullivan, Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22, 42 (1992) (fighting words exception open to "criticism as a hopeless anachronism that canonizes the macho code of barroom brawls").
the "average person"—ought to send analysts back to the drawing board.

Thus, Justice White is to be applauded for recognizing that the fighting words doctrine applies either to a direct personal insult or an invitation to exchange fisticuffs. As my analogy with the tort of intentional infliction of emotional distress makes clear, however, the personal insult should be required to be particularly offensive or outrageous before sanctions are imposed, lest the net capture too much.

Second, as discussed previously, the direct personal insult approach need not concentrate on all direct personal insults; it could focus on, or offer greater penalties for, racial insults. Justice White's opinion strongly agrees with this approach.

Some commentators have argued that the fighting words doctrine has primarily been used against people of color; for example, against black defendants for cursing white police officers. If this were true, it would be important to confine the prohibition of racial insults to those directed against people of color. The evidence for the commentators' claim, however, seems extremely speculative. What it establishes persuasively is only that discrimination occurs when people of color insult white police officers, and the rule I have already suggested, that police officers should be required to withstand such insults without retaliating, regardless of the arrestee's race, would solve this problem.

Nonetheless, a related notion—that only racial or ethnic insults directed against members of groups that are historically oppressed because of their race, color, or national and ethnic origin should be subject to prohibition—has considerable merit. Racial or ethnic insults directed at non-Jewish white Americans simply do not have the capacity to cause the same type of harm as insults directed against subordinated groups.

Notice that, by this standard, the ordinance at issue in R.A.V. is defective because it appears to apply to racial insults across the board, regardless of whether they are directed at members of advantaged or

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198 Gard, supra note 188, at 566, 571; Strossen, supra note 22, at 512; cf. Strossen, supra, at 556-58 (hate speech rules primarily enforced against people of color). The evidence put forward by these commentators is quite thin, though of course their conclusion may be correct.

199 See Matsuda, supra note 6, at 2357; see also Lawrence, Cambus, supra note 6, at 450 n.82 (best version of doctrine would not protect persons vilified on basis of membership in dominant majority groups).

200 See Matsuda, supra note 6, at 2361-69. Of course, a verbal insult delivered in a way that might be reasonably interpreted as a threat ought not be protected, regardless of its racial or ethnic content. Moreover, if the proposal were designed for a college campus and the objective were to promote civility, one might regulate a broader class of racial and ethnic insults. See also infra note 268.
disadvantaged groups. From the perspective of outsider jurisprudence, one would have to evaluate whether this defect in the St. Paul ordinance would be likely to lead to the selective, racially biased enforcement that some commentators claim has plagued the enforcement of other "fighting words" statutes. From the perspective of outsider jurisprudence, the ordinance would be substantially improved if it were limited to speech harming victims from historically oppressed groups. For the Court, however, the introduction of a historical oppression requirement would be an indefensible form of content discrimination, despite the fact that the sting of epithets is greater when directed at members of disadvantaged groups. From my perspective, outsider jurisprudence is correct to call for the prohibition of targeted racial insults. I will leave the particulars of my own somewhat complicated proposal about racial fighting words for the footnotes.

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201 Even if there were selective enforcement in other jurisdictions, the problem might not exist in St. Paul. On the other hand, the failure to make clear in the ordinance that insults directed against non-Jewish white Americans are not punishable gives courts discretion without which they may be better off.

202 See Bell Hooks, Black Looks: Race and Representation 15 (1992) ("The prejudicial feelings some blacks may express about whites are in no way linked to a system of domination that affords us any power to coercively control the lives and well-being of white folks.").

203 My proposal about racial fighting words is somewhat different than those given elsewhere, though (apart from what appears in the text) my defense of it against first amendment objections would not go much beyond what already appears in the large literature:

Speech or other expression should be punishable if it (a) is intended to insult and stigmatize an individual (except for public officials, including police officers or their private counterparts, and public figures) on the basis of his or her belonging to a group historically oppressed because of its race, color, ethnicity, or national origin; and (b) is either addressed directly to the individual whom it insults and stigmatizes, or addressed or distributed in a way that is ultimately communicated to the individual; and (c) makes use of words or symbols that insult and stigmatize an individual on the basis of his or her belonging to a group historically oppressed because of its race, color, ethnicity or national origin; unless (d) the speech or other expression is provoked by fighting words, threats, or violent conduct.

The same rules should apply when the insults are directed at families or, in some cases, small groups of individuals. See infra note 269. Approaches to the problem of gender insults, for example, should be somewhat different. Developing that notion is beyond the scope of this article.

This proposal about racial fighting words is designed for all contexts, including high school and college campuses, in which the question is whether sanctions, criminal or otherwise, are appropriate. If a campus is private, the first amendment does not apply, and the policy can be evaluated on its merits without being held hostage to the often slapdash first amendment doctrine of the Rehnquist Court.

If the context, however, is that of a public university or a criminal statute, the Court's decisions must be respected. In those contexts, my proposal provides a criticism rather than a practical proposal for action because it diverges from the Court's ultimate understanding of fighting words doctrine. Some similarities will remain, of course.
The remaining question is whether racist speech that does not target any particular individual, but instead insults a racial group by means that are "persecutorial, hateful, and degrading," is protected.

First, the Court will insist on words or other symbolic conduct of an insulting and outrageous character. Second, the Court will presumably impose an intent requirement. A person who uses insulting and stigmatizing words in a bad joke will not be subject to punishment. On the other hand, under the proposal the words themselves or the symbolic conduct would be sufficient evidence of intent in a wide variety of circumstances, even in the face of denials by the perpetrator. Burning a cross on a black family's lawn would be punishable even if the defendant insisted and credibly testified that he had believed that it was all in good fun.

Of course, that is an easy case. From my perspective, the question of whether intent should be required is a close one. I do not think people should be punished for insensitivity without accompanying malice. But I fear the intent requirement could be used to exonerate too many people undeservedly. In forging a compromise, I would recommend that the use of words or symbols that insult and stigmatize an individual on the basis of his or her belonging to a group historically oppressed because of its race, color, or national and ethnic origin should create a strong presumption of bad intent. This presumption, however, may violate due process in the criminal context. See, e.g., Yates v. Evatt, 500 U.S. 391 (1991); Francis v. Franklin, 471 U.S. 307 (1985).

Third, some racial insults directed, for example, by one member of a historically disadvantaged group at another member of the same group may insult, but not stigmatize, within the meaning of my proposal. My sense is that a racial insult directed by a European American against an African American or a Latino/a usually functions differently than do racial insults hurled by members of the same racial group at each other.

Fourth, face-to-face insults would certainly be covered. But there are a range of other possible situations. Public stigmatization of an individual without his or her presence, in circumstances where the individual would likely learn of it, is also likely to be covered. I do not think it should matter, for example, whether the victim of a racial slur happens to be present when a speaker includes the slur in a public speech or if the black family happens to be home when perpetrators burn a cross on the lawn across the street; perhaps it would matter to the Court.

More controversial still would be a circumstance in which an individual distributes a leaflet to a small group of friends containing a racist epithet directed at a particular individual, but with a directive not to republish the statement. If the statement is republished and the victim learns of it, is the perpetrator responsible? I would say yes, by analogy to defamation law. If you plan to defame someone, you are responsible for the damage caused by republication of the defamation whether or not it was anticipated. To be sure, a direct stigmatizing insult may be more injurious, but the delivery of the insult is foreseeably likely to cause injury one way or another and the perpetrator who intentionally insults and stigmatizes on the basis of race deserves little inquiry into the particular context and circumstances. Nonetheless, the Court may require a more direct communication. A middle ground position would require that it be reasonably foreseeable that the offending statement would be communicated to the victim.

The Court would not permit punishment for oral statements made by one friend to another that ultimately get back to the victim no matter how outrageous the statement. My proposal would permit punishment in such circumstances.

Finally, as discussed in the text, a showing of injury should not be required, and only stigmatizing insults directed at members of historically disadvantaged groups should be subject to sanctions. In my view, the Court would permit the former, but not the latter.

The line between targeted and nontargeted racist speech is not self-defining. I mean the distinction to be substantive and not formal. Therefore, a perpetrator who addressed a general insult about Asian Americans to an Asian American in a way that insulted and stigmatized that person would have engaged in targeted speech even though the victim's name was not used. See also infra note 269.

Matsuda, supra note 6, at 2357.
by the first amendment. Should such racist speech, uttered in public or private, be subject to punitive sanctions? Justice White seems confident that it should be protected, and practitioners of outsider’s jurisprudence are divided on the issue. To approach the question, I need to introduce my own story about the first amendment and the meaning of America.

VI
DISSENT AND THE MEANING OF AMERICA

My story is not Justice Scalia’s tale about a content neutral government, nor is it about the town hall meeting or even a robust marketplace of ideas; still less is it about liberty, equality, self-realization, respect, dignity, autonomy, or even tolerance. My story—my partial truth—supposes that the first amendment protects the dissenters, the unorthodox, and the outcasts. On this understanding, the first amendment’s major purpose and function in the American polity is to protect and sometimes affirmatively to sponsor the individualism, the rebelliousness, the anti-authoritarianism, the spirit of nonconformity within us all.

But the purpose and function of the first amendment goes beyond the protection of outsiders. For example, on my understanding, the first amendment also has special regard for the press as an institution intended to operate as a check on corruption and other abuses in private and public life, whether or not such abuses affect people on society’s margin of power; it has special regard for the speech of the powerful when it dissents from our existing customs, habits, institutions, or authorities. Nevertheless, it seems unlikely that the most important or effective criticism of abuse of power will come from the powerful; for one thing, they are unlikely to criticize those aspects of the system that benefit them as a class. In some respects, the dissent story combines an insider’s and an outsider’s perspective.

According to the dissent story, decisionmakers in millions of small and large institutions often abuse the power they exercise. It is in their self-interest to defend what they do, while it is in society’s interest to check their abuses of power. The value of dissent is clear if we believe that wielders of power (whether it is public or private) have structural and material advantages in defending their position and

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206 See supra text accompanying notes 188-90.

207 Compare, e.g., Matsuda, supra note 6 (advocating criminalization of such speech) with Lawrence, Campus, supra note 6 (arguing for a narrower proposal).

208 I have discussed this perspective in greater detail elsewhere, see generally Shiffrin, supra note 65 passim, but I did not discuss racist speech or outsider jurisprudence in that work.
that their use of power is more often self-serving than they admit—even to themselves.\textsuperscript{209}

To be sure, dissent may often be unfair in that it can be fueled and distorted by envy of those higher up in a particular hierarchy. The threat of dissent can also chill useful exercises of power. But when all is said and done, dissent and the threat of dissent make hierarchy less oppressive. Dissent communicates the fears, hopes, and aspirations of the less powerful to those in power. It sometimes chills the abuse of power; it sometimes paves the way for change by those in power or of those in power. The democratic value of dissent in this connection transcends that of dissent registered on periodic visits to the voting booth or rare court battles; it is a part of the \textit{daily} dialectic of power relations in the society.\textsuperscript{210}

So understood, the dissent story is not only a practical story about checks and balances, but also a romantic story of a society symbolized in large part by its protection of dissenters. From this perspective, racist speech that is not targeted at a specific individual presents a difficult first amendment issue. On the one hand, as David Cole writes, "[p]roponents of racist speech—Klan members, Nazis, and the like—are also a minority, and a particularly unpopular one at that."\textsuperscript{211} Moreover, it seems likely that members of the Klan and similarly racist groups perceive themselves as beleaguered, stigmatized, and marginalized.\textsuperscript{212}

On the other hand, nontargeted racist speech implicates dissenting values on both sides. Although vocal proponents of racism are a minority group despised by many, they also state aloud views that are widely though privately held in society.\textsuperscript{213} Hate speakers may differ from their fellow citizens only in their willingness to voice, baldly and

\begin{itemize}
  \item \textsuperscript{209} In this sense, the dissent model is ahistorical. On the other hand, the question of what counts as dissent in a particular society is necessarily contingent. Indeed, the ability of a regime—including the American constitutional regime—to define "dissent" might partially rob the term of its liberating potential.
  \item \textsuperscript{210} For insightful, but quite different, perspectives on power, see \textsc{Kennedy, supra} note 9; Nancy Hartsock, \textit{Foucault on Power: A Theory For Women?}, in \textsc{Feminism/Postmodernism} (Linda J. Nicholson ed., 1990).
  \item \textsuperscript{211} Cole, \textit{supra}, note 6, at 67.
  \item \textsuperscript{212} There is an important difference between organizations like the Klan and individual perpetrators of racist speech. The Klan has a history of violence. One wonders if the Federal Bureau of Investigation has infiltrated the Klan with the same ferocity it infiltrated the communists. There remains the possibility that a conspiracy to advocate violence is treated differently than individual advocacy. The former may not require a showing of imminent lawless action. Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974) (dictum that urging others to engage in violence now or in the future satisfies constitutional standard).
  \item \textsuperscript{213} Gale, \textit{supra} note 6, at 141 ("Racist, sexist, or—perhaps most clearly—homophobic expression is... far more likely to represent an overt expression of covert, or thinly veiled, majoritarian views."). The National Opinion Research Center reports that three of four whites believe that black and Latino/a people are more likely than whites to prefer living
Moreover, expressions of racial vilification can create a repressive environment in which the speech of people of color is chilled or not heard. A cross burning directed at the home of a black family is not an act of dissent against a powerful status quo; it is a threatening act of power against a victim. In a society in which race has been and continues to be used as a means of perpetuating inequality, the initiator of racist speech further aggravates the position of the subordinated. Racist speech causes many well-documented harms: it is an assault on the dignity of people of color; it humiliates and causes emotional distress, sometimes with physical manifestations; it helps spread racial prejudice, not only stigmatizing people of color in the eyes of the societally dominant race, but also in the eyes of the victims themselves, inspiring self-hatred, isolation, and impairment of the capacity for interpersonal relationships; and, finally, it frequently creates the conditions for violence.

Because both aggressors and victims can be characterized, with some accuracy, as dissenters, the dissent story underscores the difficulty of the first amendment status of racist speech. On the one hand, the dissent perspective seeks to protect those with popularly disdained views and, in an important respect, this includes those who publicly express racist views. On the other hand, the dissent perspective seeks to assure that those who are out of power or lower in a hierarchy have means of protesting their status and combating the inevitable abuses of power by higher ups. A regime that is blind to the importance of assuring that disadvantaged groups are not intimidated will contain, as its status quo, substantial corruption and abuse.

on welfare and that they are less hard working, less intelligent, and less patriotic. Poll Finds Whites Use Stereotypes, N.Y. TIMES, Jan. 10, 1991, at B10.

See Sheri Lynn Johnson, The Language and Culture (Not to Say Race) of Peremptory Challenges, 35 WM. & MARY L. REV. 21, 75 (1993) (“While ‘dominative racists,’ persons who express bigotry and hatred openly, are less common than they were twenty-five years ago, they have been replaced, in substantial measure, by closet or ‘aversive’ racists, persons who continue to hold negative stereotypes of minorities and wish to avoid them.”); Sheri Lynn Johnson, Unconscious Racism and the Criminal Law, 73 CORNM. L. REV. 1016, 1027-28 (1988) (citing literature from Freudians, cognitive psychologists, and sociologists); Sheri Lynn Johnson, Racial Imagery in Criminal Cases, 67 TUL. L. REV. 1739 (1993). See also sources cited infra note 252.

See Delgado, Words that Wound, supra note 6, at 144-46, 179; Delgado, Campus Antiracism, supra note 6, at 379, 385; Gale, supra note 6, at 148; Lawrence, Campus, supra note 6, at 452-56, 468. See generally Peggy C. Davis, Law as Microaggression, 98 YALE L.J. 1599 (1989) (discussing the impact of overt or subtle indications of prejudice upon blacks and the role of law in those prejudicial displays).

See, e.g., Delgado, Words that Wound, supra note 6; Kretzmer, supra note 6, at 462-67; Lawrence, Campus, supra note 6, at 452-56, 457-66, 482-83; Matsuda, supra note 6, at 2326-41.

See sources cited supra note 215. I do not suggest that the harms mentioned in the text are exhaustive.
How does one resolve conflicts between, or within, different stories about the first amendment? When values conflict, philosophers may debate abstractly about which course to follow, but I think the legal community tends to focus on the probable consequences of such stories (and the regulations seen to follow from them) for the flourishing of human beings, with a background understanding that all persons are entitled to respect and dignity.

A. Contribution to Public Dialogue

One could argue that racist speech makes a contribution to public dialogue. For purposes of this discussion, I shall rely on Mari Matsuda’s definition of racist speech, namely that it is a message of racial inferiority, that it is directed against a historically oppressed group, and that it is persecutorial, hateful, and degrading.\(^{218}\)

Racist speech seeks to persuade people that government (and others) should not treat all persons with equal concern and respect. If our legal system has even a prayer of claiming to be legitimate, however, it must start from the premise that all citizens are worthy of equal concern and respect.\(^{219}\) Racist speech, such as that of the Klan,

\(^{218}\) Matsuda, supra note 6, at 2357. I am sensitive to Karst’s powerful argument, see Karst, supra note 6, passim, that it is dangerous to privilege speech based in “reason” above speech based in emotion. In using Matsuda’s definition, however, I do not endorse a reason-emotion dichotomy. Indeed, I believe emotional speech is necessarily cognitive and that reason and emotion cannot be easily separated. When Jesse Jackson argues that the black community should take responsibility for its contribution to crime in general and the drug trade in particular, he communicates his message with passion: “We are far more threatened by the dope than the rope.” Bob Herbert, Blacks Killing Blacks, N.Y. TIMES, Oct. 20, 1993, at A23 (referring to lynchings as a symbol of racism). The passion is a part of his message, and it is not the antithesis of reason.

Jackson’s speech is also, of course, not an instance of persecutorial, hateful, and degrading speech. What marks out the persecutorial and hateful aspects of communication for sanctions is not that they are emotional, but that they implicate moral culpability which ought to be present before sanctions are imposed.

\(^{219}\) RONALD DWORKIN, A MATTER OF PRINCIPLE 190 (1985) (Government must “treat all those in its charge as equals, that is, as entitled to its equal concern and respect.”); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 272-73 (1977) (“Government must not only treat people with concern and respect, but with equal concern and respect.”) (emphasis added); C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 278 (1989) (equal concern and respect for person’s autonomy required). This principle is a moral principle, not merely a political principle—not just a basis for political compromise or political unity, but a moral starting point.

Although I think that some such principle is one of the minimum conditions for legitimate government, I do not think the principle can generate the sweeping conclusions that many of its advocates educe. For a more extensive explication of this position, see Steven Shiffrin, Liberalism, Radicalism, and Legal Scholarship, 30 U.C.L.A. L. Rev. 1103 (1983).

Moreover, I think this argument might well be regarded by committed racists as circular. For example, most liberals would claim that the compulsory education of eight-year-olds and our denying them access to many societal privileges and benefits does not deny them equal concern or respect but rather is a recognition of their different circumstances. Some racists would similarly say that unequal treatment of people of color is appropriate to
therefore promotes governmental illegitimacy and makes no "contribution" to public political dialogue. In this limited context, the best test of truth is the system's foundational premise of equality not whether racist speech can emerge triumphant in the marketplace of ideas.

Their circumstances and therefore does not deny them equal concern or respect as human beings. To answer this racist argument requires more than the invocation of a principle of equal concern and respect; it requires a substantive understanding of the principle. I do not propose to refute the racist here. Certainly, our legal system has rejected the racist understanding. Nonracist equal concern and respect is what the thirteenth and fourteenth amendments clearly require. Amar, supra note 6. In general, I do not claim to offer arguments that would appeal to a racist.

The position of communists is more complicated. Communists argue that the system is so illegitimate and its evils so serious that it deserves to be overthrown. If they are correct, their contribution to the marketplace of ideas is valuable. There is, of course, a risk that an attempted overthrow might occur in circumstances where the evils are not sufficiently serious. Current law tries to address that possibility. See Brandenburg v. Ohio, 395 U.S. 444 (1969). If the Ku Klux Klan succeeds, in contrast, it is inevitably the case that the system is illegitimate.

For detailed presentation of a similar argument, see Harel, supra note 6. Robert Post argues, on the other hand, that the legitimacy of the system depends upon democratic dialogue including speech that questions the assumptions of the system. Post, supra note 6, at 280-85. Although complete agreement among the citizens is not possible, id. at 281, 283, it is possible to subject the "political and social order to public opinion" and "to instill a sense of self-determination." Id. at 282. Post concedes that the achievement of "autonomous self-determination for both majority and minority is a complex and contingent question, dependent upon historical circumstances." Id. at 283. It seems plain to me that people of color in general and millions of others (perhaps most) do not have the sense of self-determination that Post argues is a necessary feature of democracy. Populist frustration about the failure of politicians to do the work of the people illustrates the point. It seems hard, therefore, to understand why racist speech causing harm should be constitutionally immunized in order to protect a self-determination that does not exist. More generally, Post denies that equality trumps dialogue. Id. at 292-93. Apart from invoking an argument about the difficulty of finding someone to interpret equality and positing that equality requires self-rule, Post's argument against a substantive theory of equality is that it would interfere with self-determination. This is puzzling, however. Clearly, Post would not permit racial discrimination (or slavery) to be legitimized as a product of democratic dialogue, yet to limit the possible results of democratic dialogue is to limit both the reality of and the sense of self-determination. Of course, Post might respond that equality and other human rights can limit the output of public dialogue (thus limiting self-determination), but not the dialogue itself. In the end, however, it is easy to understand why self-determination is treated as an important value; it is difficult to understand why it would deserve the exalted place Post would provide. That we should strive for democracy is an insufficient answer because those who strive to limit public dialogue in the name of human rights also claim to be operating from democratic principles. Any definition of democracy is contested.

Many, of course, would object that courts should not evaluate the contribution of particular categories of speech to the marketplace of ideas, see, e.g., Massey, supra note 6, at 113, but the courts have certainly done so in the context of fighting words, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942), obscenity, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973), and defamation, Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974). Determining that a category of speech is at odds with a foundational premise of the system is not only consistent with these precedents, but also less open ended.

Massey contends that "[p]ublic discourse cannot be defined normatively, for any such attempt is necessarily hinged to some ideological notion of what our collective identity
Contributions to dialogue might arise in other ways, however. Racist speech can potentially be intertwined with an exposure of real evils that deserve to be remedied. More important, racist speech certainly stimulates responses that contribute to the democratic dialogue. It may contribute to "the clearer perception and livelier impression of truth produced by its collision with error." Moreover, racist speech inadvertently adds a valuable fact to the marketplace of ideas: the rest of us learn that extreme racists are active in society.

Although racist speech seems to have some minimal marketplace value, it is much more difficult to argue that this value outweighs the harm that racist speech causes. As an African American father once said to me when I spoke about the contribution of racist speech to the democratic dialogue, "Tell that to my seven-year-old daughter."

B. The Right of the Speaker

An important feature of the first amendment is its protection of the autonomy (or self-expression or liberty) of the speaker. Opponents of racist speech regulations can argue that such regulations unreasonably impinge on the right of the speaker to autonomy, liberty, or self-expression, but this argument has substantial weaknesses. Recall that one of the minimum conditions of a legiti-
mate system is that it assumes that all citizens are worthy of equal concern and respect. It is hard to understand why a polity governed by this assumption would regard it as vital to offer constitutional support for individual preferences that contradict the major premise on which the polity is constituted. Moreover, the racist speaker is in a poor position to claim a right derived from the principle that all citizens deserve to be treated with equal respect or concern because the speaker wholeheartedly denies this principle. The racist speaker, then, is practically estopped from using this first amendment theory.

Perhaps, however, principles of estoppel should play no role. Even if the speaker might be inconsistent in raising the right, the system might not be inconsistent in respecting it. Moreover, the person who makes them, by encouraging rigid, dichotomous thinking and impeding moral development.

230 This does not mean that preferences in conflict with other principles or amendments are suspect. My claim is that the principle of equal concern and respect is foundational in the sense that it is necessary for a legitimate constitution. That could not be said of federalism or separation of powers, for example.

On the problems associated with taking people's preferences as given, see Cass R. Sunstein, Democracy and Shifting Preferences, in The Idea of Democracy 196 (David Copp et al. eds., 1993); Joshua Cohen, Moral Pluralism and Political Consensus, in id. at 270.

231 A racist speaker need not necessarily argue this way, however. See supra note 219.

232 The claim of communists is different in this respect. Communists affirm the equality principle; they deny it has been carried out. To the extent that communists argue against free speech, it seems to me that they are in the same position as the Ku Klux Klan; nonetheless, the harm of their speech is not in the same league as racist speech. As to the marketplace value of communist speech, see supra note 220.

It might be argued that, because the principle of equal concern and respect is subject to varying interpretations, an argument of this sort has serious "slippery slope" problems. I would note first that this objection does not deny that the speech of the Klan is at odds with the principle of equal respect for persons. Rather, it worries that the same argument will be used in damaging ways in other contexts. As a practical matter, I think the objection is unfounded. Nor need I rely on the limited form that the argument plays in the analysis that follows.

The argument that creating an unprotected category of racist speech should be avoided because it would lead to other unprotected categories has to suppose that judges who would otherwise not have created new categories would do so because of the racist speech category. Apart from the speculative character of the argument, I am not prepared to assume that the creation of a new category of unprotected speech that followed from or bore a close resemblance to a racist speech category would necessarily be bad. It seems that the issue should turn on the facts—as it should with racist speech. For slippery slope arguments, see Linzer, supra note 6, at 205-19; Post, supra note 6, at 315-17. For discussion of the character of slippery slope arguments, see Frederick Schauer, Slippery Slopes, 99 Harv. L. Rev. 361 (1985).

233 Speakers who reject the premise of the system might argue that having been saddled with its disadvantages, they should not be denied its benefits. The problem with this argument is that from the perspective of the system, they have not been disadvantaged; they had no entitlement to mistreat others, and they have not themselves been otherwise mistreated.

234 Cf. John Rawls, A Theory of Justice 220 (1971) ("The conclusion, then, is that while an intolerant [religious] sect does not itself have title to complain of intolerance, its
system could condemn the content of the expression, but nevertheless support the speech right. The argument would be that respect for speakers demands that they be permitted to autonomously choose good or evil, right or wrong. Autonomy of this sort is certainly important, but its value is not absolute; if respect for persons demanded absolute autonomous choice, persons would have the right to choose to murder. Of course, our system does not permit that, nor does it permit the use of heroin even when its use does not directly harm others. These examples are, of course, restrictions of conduct and not speech, but speech autonomy is hardly absolute. In the arena of speech, for example, our system limits the autonomous choice to make defamatory statements in some circumstances. The basic problem with the autonomy argument is that it cannot show that the value of individual autonomy outweighs the harm caused by racist speech. Nor can it show that the idea of respect for persons demands any particular weighing of the competing values in this context. Any confidence that the value of free speech in this context outweighs the harm thus requires placing a thumb on the scales.

C. Political Identity and the First Amendment

Many would claim, however, that the point of the first amendment is that a thumb in favor of free speech should be placed on the balancing scales. I do not propose to retrace the question of whether balancing is itself desirable under the first amendment. It is certainly the reigning paradigm of first amendment law. Similarly, but as is less frequently noted, it is not the case that free speech invariably gets freedom should be restricted only when the tolerant sincerely and with reason believe that their own security and that of the institutions of liberty are in danger.

235 For examples of such limitations, see supra note 108.

236 For discussion of the harm, see sources cited in supra note 215. To get at the point another way, if John Rawls' "veil of ignorance," RAWLs, supra note 234, at 136-42, yields the principle that the basic structure of society should be arranged to maximize the chances of the least advantaged members in society (the "difference principle," id. at 75-83), it seems clear that decisionmakers applying such a principle would seek laws against racist speech targeting historically disadvantaged groups—unless, as I will suggest, such laws would make matters worse.

It might be objected, however, that liberty rights take priority over the difference principle, e.g., id. at 243-51, so that the racist's right of free speech should prevail. But this objection is flawed. The justification of the priority of the liberty principle over the difference principle depends on the assumption that such a priority secures the primary good of self-respect. Id. at 543-48. This assumption is particularly dubious with respect to hate speech. More interesting is the argument that the audience, including members of the disadvantaged class, have an interest in hearing such speech.

237 Although conceptions of respect and autonomy are not without meaning, the same problem arises in many other contexts as well. See generally Shiffrin, supra note 219, at 1147-70 (1983) (rejecting the neutrality principle as a basic principle of government).

privileged weighing in balancing cases; speech is favored in most contexts, but it is not favored over all other values.

In *Gertz v. Robert Welch, Inc.*,239 for example, the Court fashioned a set of rules to resolve the conflict between preserving individual reputation and the freedoms of speech and press. Rather than supposing that free speech was more important than reputation, the Court spoke of the need for rules which would come to a "proper accommodation"240 of competing interests, both of which it obviously regarded as important,241 and neither of which it explicitly preferred in the abstract. Although the Court has often stated that free speech gets extraordinary weight in the balancing process, those statements must be read against a broader background which reveals that the weight afforded to speech in practice turns on context. Contrast, for example, the different weights afforded free speech values in the categories of obscenity242 and pornography.243 The extent to which free speech rights get extra weight in the first amendment balance, then, is context sensitive.244

Why is this point so frequently missed? In part, because of wishful thinking: people want to believe their country is just, and they also believe justice depends upon a robust first amendment. For many, what is unique about this country is that it cherishes and protects free speech. Indeed, a major reason why people seem to value free speech (beyond the instrumental reasons) is that their sense of political identity, of belonging, is bound up with the first amendment. The protection of racist speech allows people to maintain a *symbolic* commitment to free speech and, more generally, to reaffirm the notion that we live in a free country. This symbolism is not entirely unattractive; it is important that citizens take pride in constitutional values.245 Thus, the

240 *Id.* at 325.
241 The Court indicated both that it would not lightly require states to abandon the interests in compensating individuals for defamatory falsehoods, *id.* at 341, and that it was "especially anxious to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." *Id.* at 342 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).
242 Strict scrutiny is not applied. See *supra* text accompanying notes 89-104.
243 American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (when content discrimination is present, anti-pornography ordinance is automatically unconstitutional).
244 SHIFRUN, *supra* note 65, at 9-45.
245 It is certainly important from the centrist perspective fostered by that of constitution building. I also think it is important from the perspective of the left, but that is a far more complicated issue. See generally Steven Shiffrin, *The Politics of the Mass Media and the Free Speech Principle*, 69 Ind. L.J. 689 (1994) (arguing that the left benefits from the first amendment even though the content produced by the institutional media is generally hostile).
powerful appeal of first amendment rhetoric\textsuperscript{246} serves a significant purpose.

Nonetheless, free speech is often compromised (consider again the rules governing defamation and obscenity) without major loss to the first amendment's symbolic importance. If free speech can be accommodated when it clashes with reputation or sexual mores, it is not easy to appreciate why it should stand absolute, or be privileged in the balance, in a contest with racial equality. As in these other special cases, the sacrifice of first amendment symbolism would be partial, not total. Also, while it is important to maintain the symbolism of free speech, it is also important to maintain the attractive symbolism of racial equality and an anti-racist\textsuperscript{247} public morality. Moreover, it seems difficult to justify tolerating real harm in the name of promoting symbolism.

D. The Effectiveness of Regulating Nontargeted Hate Speech

The first amendment contains many values; I have discussed a few of the more important ones. I have argued at length that the impact on free speech values of racist speech regulation should be considered palpable, but, nonetheless, tolerable. This conclusion, however, depends upon the assumption that racist speech regulation would be effective in achieving its goals, and that assumption, unfortunately, is open to serious question.

One important goal of the regulation of nontargeted racist speech is simply to prevent such speech and thereby eliminate its harms. Another goal of such regulation is to affirm an anti-racist public morality which over the long term could persuade people (including the privately prejudiced) to abandon racism. There is substantial room for worry, however, that the imposition of punitive sanctions against nontargeted racist speech would harm people of color.\textsuperscript{248}

Some, indeed much, racist speech would no doubt be deterred, and that is an important result. However, some racist speech would not be wholly deterred, but rather transformed into an even more effective yet unprosecutable Willie-Horton-like "code" speech.\textsuperscript{249} Even if all explicit racist vilification were eliminated in American soci-

\textsuperscript{246} See, e.g., West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . .").

\textsuperscript{247} Many of those who maintain the innocent assumption, see, e.g., Flax, supra note 124, that we can have it all, are those who do not share in the risks of failure, and who have not directly experienced the harms associated with racist speech. But see sources cited supra note 6.

\textsuperscript{248} I do not think this would be true in all circumstances. See infra note 270.

\textsuperscript{249} See, e.g., CosE, supra note 4; FeAGIN & SIKES, supra note 4.
ety, racism and much unprosecutable implicitly racist speech would still remain. That speech is not only part of the basic fabric of social life, but also quite harmful. Even if a program against the speech of racial vilification were entirely successful, then, only the tip of the iceberg would have been liquidated. Moreover, it is important to recognize that much racial vilification will not be deterred. Of particular concern in this connection is public racist speech. Self-styled "patriots" who think that racist speech sanctions violate the very meaning of America would be induced to defy the regulations; they would act on the belief that whiteness is part of the core of America, and that the first amendment necessarily protects expressions of white superiority.

Unfortunately, millions of Americans hold the view that the prohibition of such expression violates a precious constitutional freedom. As a consequence, public racists might become martyrs and governmental intervention might be resented. This resentment could aggravate existing racism, or be transformed into new racism by demagogues.

The social science literature concerning racism contains a substantial debate about the extent to which animosity toward people of color fuels support for policies that negatively affect people of color. One group of theorists argues that a form of "symbolic racism" is of major explanatory value in understanding contemporary racial politics. Symbolic racism "represents a form of resistance to change in the racial status quo based on moral feelings that blacks violate such traditional American values as individualism and self-reliance, the work ethic, obedience and discipline." As a consequence, these theorists argue, prejudice "remains in this century, as it was in the last, a potent influence in many political choices." An important related claim of these theorists is that the opposition of millions of citizens to programs designed to benefit people of color frequently has little to

250 Of course, ACLU liberals might think such an ordinance violates the meaning of America, but they would not engage in racist speech as a form of protest.

251 Neuborne, supra note 6, at 380; Strossen, supra note 22, at 559.


253 Prejudice and Politics, supra note 252, at 416.

254 Id. at 414.
do with their own self-interest and much to do with symbolic racism.\textsuperscript{255}

Other theorists place less emphasis on the role of prejudice and more emphasis on the role of real group conflict over access to material or other goods, or status competition.\textsuperscript{256} From this perspective, racism is a rational attempt to maintain an advantageous position even if what is at stake is not a material good, but merely a racial status. In their view, the symbolic race theorists define self-interest too narrowly.

Without resolving the debate, it seems clear that prejudice and realistic group conflict are both important and, in many circumstances, dynamically interrelated.\textsuperscript{257} Moreover, there is considerable overlap between the two theories. People who are relatively low in the socio-economic hierarchy (and who consequently feel deprived) are more likely to harbor resentment toward people of color than those who are higher.\textsuperscript{258} Derrick Bell argues that it has been traditional for American politicians (either explicitly or through code words) to rally whites

on the basis of racial pride and patriotism to accept their often lowly lot in life, and encourage[ ] [them] to vent their frustration by opposing any serious advancements by blacks. Crucial to this situation is the unstated understanding by the mass of whites that they will accept large disparities in economic opportunity in respect to other whites as long as they have a priority over blacks and other people of color for access to the few opportunities available.\textsuperscript{259}

Whether the racism of whites is fueled by prejudice, status competition, or both, whites in general do seem to resent special efforts to help people of color. Indeed, attitude studies regularly show that white Americans generally believe that government has done too

\textsuperscript{255} See supra sources cited note 252.
\textsuperscript{257} Lawrence Bobo, for example, one of the most articulate critics of the theory of symbolic racism, settles for the moderate conclusion that "alongside our traditional concern with individual prejudice, we should recognize the importance of group conflict." Bobo, Group Conflict, supra note 256, at 109 (emphasis added).
\textsuperscript{259} Bell, supra note 256, at 9.
much for blacks. Of course, millions of people who do not claim that people of color are inferior think that government has done too much for people of color at the expense of the white middle class. Although some would broadly label these millions "racists," in my view it is better to think in this context of racism as occurring on a continuum, rather than deciding in a binary fashion whether particular people are or are not racists. Thus, in my view, one can wrongly believe that government does too much for people of color without being a racist. Nonetheless, if one holds that belief, it becomes natural (but not inevitable) to resent not only the government which provides the benefits, but also the "undeserving" beneficiaries. As I would characterize it, then, the more resentment, the more racism.

From the perspective of many millions of Americans, to enact racist speech regulations would be to pass yet another law exhibiting special favoritism for people of color. What makes this kind of law so potentially counterproductive is that its transformation of public racists into public martyrs would tap into widespread political traditions and understandings in our culture. In short, the case of the martyr would be appealingly wrapped in the banner of the American flag. Millions of white Americans already resent people of color to some extent, and penalties could be set at a very high level, and this might reduce the number seeking to be martyrs, but it would also intensify the martyrdom and concomitantly fan the racism.

To reiterate, I am not claiming that nontargeted racist speech fails to cause injury. But cf. Charles H. Jones, Proscribing Hate: Distinctions Between Criminal Harm and Protected Expression, 18 WM. MITCHELL L. REV. 935, 951 (1992) (arguing that presence or absence of targeting determines whether offense or coguizable harm is present, by drawing on definition of harm from Joel Feinberg, Harm to Others 38-36 (1984)). Much of the critical race scholarship convincingly argues that even nontargeted racist speech harms many individuals and the community. See sources cited supra note 6. Moreover, sanctions would offer some generalized relief. But, if imposing sanctions promotes more racism than exists in the status quo (admittedly, a contestable claim), the case against sanctions is correspondingly strong.
degree. To fuse that resentment with Americans’ love for the first amendment is risky business.

I recognize that a substantial portion of this argument bears an uncomfortable resemblance to an argument frequently made, by the Court and some commentators, against affirmative action programs;

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263 Richard Delgado has observed that British and Canadian laws against racist speech met with initial resistance which has now largely subsided. Delgado, *Campus Antiracism*, supra note 6, at 371. This observation might be used to support the notion that racial polarization is not triggered by racist speech legislation (Professor Delgado uses it to argue that fears of censorship proved to be misplaced. *Id.*). Whether or not racial polarization was fostered in Britain and Canada, the prospects in the United States seem more bleak. To be sure, racism exists in both Britain and Canada, but in the United States racism has been central to election campaigns, and it seems to occupy a more central place in the national consciousness.

Delgado argues that laws against racist speech could play a substantial role in controlling racism, suggesting such laws and rules would “‘create a public conscience and a standard for expected behavior that check overt signs of prejudice.’ Nor is the change merely cosmetic. In time, rules are internalized, and the impulse to engage in racist behavior weakens.” *Id.* at 374 (quoting Gordon W. Allport, *The Nature of Prejudice* 470-71 (25th Anniversary ed. 1979)). This is sometimes true; the Civil Rights Act of 1964 provides a good example of the phenomenon of an anti-racism law eventually becoming internalized. On the other hand, anti-racist rules can create backlash. Many have argued that busing and affirmative action programs have had such an effect. I do not contend, of course, that backlash is the only factor to be used in making determinations about such programs. See infra text accompanying notes 264-65. The issue I raise is whether racist speech regulations are likely to produce such a backlash, and how much of a difference that should make in assessing their desirability.

As I suggest later, see infra note 268, the rise of the anti-“political correctness” campaign exemplifies the resistance I believe more general racist speech regulation would face. Finally, racist speech regulation in other countries has been accompanied by an increase in racial violence. Kevin Boyle, *Overview of a Dilemma: Censorship versus Racism, in Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination* 1, 2 (Sandra Coliver ed., 1992); Paul Gordon, *Racist Violence: The Expression of Hate in Europe, in id.* at 9, 9-17. I do not push this point because there might have been an even greater increase of racial violence in the absence of such legislation. The same point applies to the increase of racial violence on college campuses. And, as I also suggest later, see infra text accompanying notes 276-78, the argument I make here is tentative and necessarily speculative.

264 Proposed anti-pornography legislation seems to be quite different. With exceptions, the commercial distributors of pornography are in the main less ideologically committed than members of the Klan or the neo-Nazis; thus, deterrence is likely to be more effective. Similarly, the misogynist messages of pornography are less explicit than the racist messages of the Klan or the neo-Nazis; thus, suppression of obscenity or pornography is likely to be regarded as an unconstitutional suppression of a political ideology by many fewer Americans. On the other hand, if society attempted generally to suppress nontargeted hate speech against women, the general public would likely regard such an attempt as unconstitutional.

I should be clear that the risk about which I am concerned is increased racism and its consequences, not a risk to the first amendment. Some might argue that the creation of a racist speech exception to the first amendment would lead the public to believe that in first amendment jurisprudence all that matters is whose ox is being gored, and that any such reaction would trigger public cynicism about the first amendment. With all the cynicism in this country, however, the first amendment seems to have been un tarnished. I am not worried that public respect for the first amendment would be diminished in ways that would be otherwise damaging.
they "may in fact promote notions of racial inferiority and lead to a politics of racial hostility." The problem with these arguments is not that they are false; affirmative action programs do create racial hostility, which is further fueled by the perception of many that basic constitutional principles have been violated. Nonetheless, affirmative action programs provide benefits—such as access to jobs, contracts, and places at educational institutions—which (at least in my view and, more importantly, in the view of the recipients) outweigh the disadvantages. The difficulty with regulations against nontargeted racist speech, I am suggesting, is that, unlike affirmative action programs, they are likely to promote racial hostility without sufficient compensating advantages.

Is this objection equally applicable to targeted racist speech? I do not think so. Applying racist speech sanctions to targeted racist speech does risk the same fanning of racial resentment, but this effect is somewhat mitigated by the presence of a specific victim. When government protects a specific victim from a remark which is personal, the public is much less likely to see the law as censorship. Irrational as it may seem, a speaker who explicitly and obviously harms...

266 This is a common claim, and I believe it to be true, but it has yet to be "[ ] supported by any systematic evidence." Paul Burstein, Affirmative Action and the Rhetoric of Reaction, Am. Prospect, Summer 1993, at 138, 143.
267 This is true at least at the time of application (why else would they apply?), and I am not aware of any study showing that beneficiaries generally are subsequently dissatisfied with their decisions to apply and accept the benefits of such programs although, of course, there are prominent examples of individuals who are now dissatisfied.
268 Indeed, the relentless right-wing media campaign against "political correctness" underscores the capacity of hate speech regulations to foment racial hostility.
269 On the other hand, the aspect of my proposal that limits sanctions to speech attacking members of historically oppressed groups, borrowed from Matsuda, supra note 6, is likely to be politically unpalatable in many contexts. To the extent that it is, it seems better to drop that aspect than to drop prohibitions altogether. Apart from the politics of the "second best" (an issue she has yet to address), I agree with Professor Matsuda.
270 One exception to my general view is speech in the workplace. Nontargeted speech in that context can create a hostile environment. In that context, however, free speech issues are taken far less seriously. MacKinnon, supra note 6, at 49-50. Some of the reasons may be an intuition that the workplace is not a place for free speech (an intuition I do not share, but which helps to explain why the issue has been regarded as more sensitive in universities); the sense that racist workplace speech is actually discrimination; and perhaps a general appreciation for the special difficulty of working under such conditions. One of the general themes of MacKinnon's Only Words, supra note 6, is to ask whether it makes any sense to recognize sexual and racial harassment by words in the workplace but not in other contexts as discriminatory conduct.

Another exception to my general view occurs in the context of what the public would regard as threats (regrettably, this class of speech is narrower than what victims would regard as threatening). Public sympathy for racist speakers who issue direct threats will be low. At least, the question of whether to define speech as targeted or nontargeted should be affected by the presence of threats. Certainly, if a small group is threatened by a nontargeted racial epithet, worries that the imposition of sanctions would be counterproductive diminish substantially.
a particular person through speech is often less sympathetic than one whose speech hurts many more people. The harm is more concrete and less diffuse.

More important, the principle that the legal system should avoid the imposition of sanctions for particularized harm done to individual victims, out of fear that the rendering of justice will fan racial resentment, is a principle to be avoided (save perhaps in the most extreme of circumstances). The individual may wish to make that judgment (by refusing to cooperate in a proceeding against the perpetrator), but society should not. By contrast, when a group is generally victimized by racial slurs, the group should be fully entitled to decide that legal remedies will make things worse for the group and decide that legal remedies should not be made available despite the harm. Indeed, that is precisely what I argue people of color and the larger society should conclude.

Many practitioners of outsider jurisprudence would resist that conclusion. One reason for that resistance is the enormous symbolic value of a broad prohibition on racist speech, which could be thought to outweigh the harms associated with the increased racism that might follow. For those of us who are not persons of color, the question arises: who are we to weigh the symbolic value against the harm, if we are neither the primary beneficiaries of the symbolic value nor the potential victims of the discrimination and abuse? I have little difficulty in being predominantly guided on this issue by what the majority of people of color think (recognizing, of course, that differences among people of color may be substantial).

Nevertheless, there are considerations that ought to take some steam out of the symbolic value argument. First, it should be recognized that political struggles are always fraught with symbolism. If a general racist speech ban is passed, symbolic issues arise concerning what kinds of racist remarks are properly prosecuted and which are not. Any feelings of inclusiveness generated by the passage of hate speech legislation might quickly dissipate. Moreover, even if the implementation of a racist speech ban would be effortless, other political struggles of major symbolic importance would still recur, and for many people, if not most, the joy of last year’s symbolic victory will be quickly eclipsed by the sadness of this year’s defeat. Finally, there ought to be some concern that what is of important positive symbolic

Finally, the likelihood of a counterproductive reaction is substantially reduced in some "captive audience" situations. When, for example, nontargeted racist graffiti are placed in dorms and other common living spaces in contexts where the manifest intent is to injure or humiliate a captive audience, the perpetrator is far less likely to be regarded by the public as engaging in protected dialogue. Here again, the line between targeted and nontargeted speech tends to dissolve.
value for people of color may have negative symbolic value for millions of others. When so many crucial issues of poverty, violence, and other ills confront people of color, it may be prudent to have the system give up chips in a different place.

There is another unhappy aspect to my overall conclusion: it suggests compromising with racist preferences in the case of nontargeted racist speech. A practitioner of outsider jurisprudence might object to the argument precisely on the ground that compromises with racism are abhorrent. The alternative, however, as I have argued, may only be to increase long-term racism by standing on principle. Still, a practitioner of outsider jurisprudence might oppose compromising with racist preferences even if the alternative to compromise is increased racism; she might argue that the psychic benefit (or Kantian purity) of maintaining a simple political identity that never gives in to racism is so attractive and powerful and has so much integrity that it can ground counterproductive measures.

Ironically, ACLU liberalism takes similar pride in the uncompromising integrity with which it protects the first amendment. Both ACLU liberalism and outsider jurisprudence of this stripe avoid compromise and adhere to a well defined, relatively uncomplicated political identity.

In a sense, this form of argument replays the 1960s rhetorical conflict between some radicals and liberals. These radicals attacked the liberals saying that they "sold out," that they lacked integrity, that they accepted short term incremental gains at the expense of long range radical change, and that they lacked "analysis" and vision. The liberals, on the other hand, accused the radicals of being stubborn, unrealistic, utopian, and self-indulgent.

One of the interesting aspects of this dialogue, and of other arguments about political identity, is the extent to which political identity can affect the estimate of the probable consequences of particular political moves. Presumably, "hard line" ACLU liberals would have an easy time concluding that racist speech regulation would increase racism. By contrast, "hard line" practitioners of outsider jurisprudence have a stake in denying this. And the liberal, compromising pragmatists—who seek not to be marginalized, who appreciate their place in the dialectical dance, and who revel in the diversity and com-

271 See sources cited supra note 4.

272 Cf. West, supra note 4, at 65 ("In American politics, progressives must not only cling to redistributive ideals, but must also fight for those policies that—out of compromise and concession—imperfectly conform to those ideals. Liberals who give only lip service to these ideals, trash the policies in the name of realpolitik, or reject the policies as they perceive a shift in the racial bellwether give up precious ground too easily.").

273 E.g., The New Student Left: An Anthology (Mitchell Cohen & Dennis Hale eds., 1967).
...plications of political and social reality—may look for complexity and find it (whether or not it is there). Hard proof about either the conclusions or the underlying psychology would be hard to come by.

In any event, my contention should be clear. I am not arguing that racist speech should be protected to safeguard the liberty of the speaker or because it is valuable. Nor do I think that counter speech will cure the harm of public racist speech. I am not worried about a chilling effect in the marketplace of ideas (though some marginally valuable speech could be lost), nor am I worried about the vagueness of working out standards case by case (though vagueness is of course not a virtue).

The argument I raise is quite different. It suggests that American society may be so thoroughly racist that nontargeted racist speech regulations would be counterproductive. If I thought such regulating would be effective on balance in combating racism, I would presently support punitive measures against public instances of racial vilification even when not targeted against individuals. Further, I want to make clear that I am doing no more than putting an argument on the table. In a deep sense, the choice is not ultimately mine to make; therefore, I do not seek to impose my predictions and weighing of the potential effects of racist speech regulations on people of color. Were I a member of a legislature who made this argument only to find it rejected by people of color, I would vote, according to their preferences, for nontargeted racist speech regulation. It is their lives which will predominately be affected by the legislation, and it is this effect that is the crux of my argument. Similarly, as a contributor to academic dialogue, I believe that an argument of this sort carries considerably less weight if the people purportedly advantaged by it end up

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274 See generally Delgado & Stefancic, Images, supra note 6 (arguing that free speech not only fails to combat racism, but can exacerbate the problem). I do not mean to suggest that more speech is never helpful. It cannot erase injury, however, and it will not eliminate the racist character of society.

275 Too many people assume that vagueness is always fatal in first amendment analysis; much vagueness is tolerated in first amendment doctrine, and it should be. Take defamation. Sorting out the differences between defamatory and nondefamatory statements is not always easy, but that does not make the tort of defamation unconstitutional. The amount of vagueness that is tolerable in first amendment contexts should depend on the importance of the governmental interest, the extent to which the regulation furthers the interest, the possibility of less restrictive alternatives, and the impact of the vagueness on protected speech.

276 My conclusion is, therefore, contingent on empirical conditions. In many other societies, the case for broader racist speech regulations seems stronger, and the experience with such regulations, albeit mixed, seems to have been positive in many jurisdictions. Striking A Balance: Hate Speech, Freedom of Expression and Non-Discrimination (Sandra Colver ed., 1992).

277 For the more sweeping contention that people of color (or other oppressed groups) should control the resolution of all issues that affect them exclusively, see Iris M. Young, Justice and the Politics of Difference 184 (1990).
ultimately, after consideration, rejecting it. People of color might think that the tangible benefits of deterrence and the symbolic importance of the legislation outweigh the speculative possibilities of nondeterrence, evasion, and increased racial hostility—that, in short, the advantages of taking a stand outweigh the costs.

They might. But they might not. Arguments never pressed are never adopted. So I suggest that attention be focused more upon the empirical costs and benefits of racist speech regulation and less upon the all-too-frequently exaggerated first amendment values.

Conclusion

In the course of this discussion of R.A.V. and racist speech, I have discussed five major different perspectives on the issue of racist speech. Justice Scalia seems moved by the image of a content-neutral government, although that image is deeply compromised in practice. Justice White appears to pursue the image of an impartial magistrate bound by the rule of law, though his reading of the law is badly skewed in the R.A.V. case. St. Paul's ordinance, as construed by the state supreme court, seems to reflect a conception that uninhibited public debate deserves protection but private racial epithets do not. St. Paul's ordinance is not ideal from the perspective of outsider jurisprudence because it punishes speech against historically advantaged groups as well as historically disadvantaged groups, drawing no distinction between them. It thus fails to appreciate the amplified character of the injuries such remarks cause minorities, and leaves open the prospect of selective prosecution of minority speakers.

The dissent perspective I endorse is not an instance of outsider jurisprudence; for one thing, it is not built predominantly from the experience of people of color. It protects both dissent by the powerful press and dissent from the marginalized. It freely employs an insider's perspective in defending dissent, contending that the system benefits from continued critique. Nonetheless, the dissent perspective shares much with the outsider perspective, and the conclusion I draw from the dissent perspective is one that I think outsider jurisprudence should also favor. Speech targeted at members of historically

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278 In addition, victims of discrimination may be particularly acute in determining the circumstances in which, and the extent to which, discrimination arises.

On the other hand, identifying what the "general will" of people of color is could be quite tricky. People of color are divided on the issue of hate speech regulation. How much of a majority does one need in order to defer? Does one need a sense of the amount of information held by those who have opinions? I do not purport to resolve questions like these. I only mean to observe that deference is appropriate, but that the determination to defer could be undermined by diversity of opinions.

279 Practitioners of outsider jurisprudence would probably do so as well, but the emphasis of the perspectives is different.
oppressed racial groups that insults on the basis of race ought to be punished;\textsuperscript{280} individuals deserve redress\textsuperscript{281} for what is intended and felt as particularized injury\textsuperscript{282} even if racist speech regulations are symbolically ineffective or even counterproductive. But government intervention against non-targeted racist speech depends on a judgment that it will effectively promote—or even institute—an anti-racist public morality in our culture. Public morality may, perhaps, be furthered through other forms of socialization,\textsuperscript{283} but the combination of racism and of the purist stories we tell ourselves about the first amendment (despite actual doctrine, which is far from absolutist) makes it unlikely that racist speech regulation could ever serve as an effective source of anti-racist public morality.

There are many stories we tell ourselves about the first amendment, however, and America would still have a FIRST AMENDMENT and a strong first amendment tradition even if it enacted general racist speech regulations. The problem is not the first amendment; the problem is that racism is now and always has been a central part of the meaning of America.

\textsuperscript{280} People will not be converted merely because they are punished, Minow, \textit{supra} note 6, at 1403, and "re-education" of the perpetrator is not a promising form of punishment. Grey, \textit{supra} note 6, at 88 n.19 (rejecting multicultural sensitivity training as punishment for harassment).

\textsuperscript{281} This is not to assume that all individuals will move for redress; much of the writing about the injuries caused by racist speech makes clear that flight may be a more frequent reaction than confrontation. But the availability of the remedy is what justice seems to require. Victims of physical assault might not pursue redress, but they deserve a potential remedy.

\textsuperscript{282} The same statements are likely in most circumstances to cause broader injury to individuals not explicitly targeted and may be intended to do so, but that harm would not be the basis for regulation.

\textsuperscript{283} I do not see any particular grounds for optimism. \textit{See generally} Bell, \textit{supra} note 256 (racism is probably a permanent feature of American society).